Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DO GEUN OH, *et al.*,

Petitioners,

v.

MITSUI & CO., LTD., *et al.*,

Respondents.

SUK YOON KIM, on behalf of himself and all others similarly situated,

Petitioner,

v.

ISHIKAWAJIMA HARIMA HEAVY INDUSTRIES, LTD., *et al.*,

Respondents.

SA SON SIN,

Petitioner,

v.

MITSUI & CO., LTD., *et al.*,

Respondents.

JAE SIK CHOE,

Petitioner,

v.

NIPPON STEEL CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in nullifying a state statute that provided an opportunity for relief against local corporations affiliated with foreign companies that enslaved foreign nationals to labor under inhumane conditions during World War II, the Ninth Circuit erred by fashioning a novel, unprecedented and inflexible rule that precludes any state action that somehow "relates to war," and, by doing so, usurped this Court's own test for determining whether a state statute intrudes on the federal government's "foreign affairs" powers.

Alternatively, whether in applying the federal foreign-affairs powers to all things somehow "related to war," the Ninth Circuit subverted this Court's foreign-affairs precedent and in so doing unleashed a novel and dangerous precedent that can wrongfully extinguish the rights of private litigants suing other private litigants.

PARTIES TO THE PROCEEDING

This Petition is filed on behalf of plaintiffs Suk Yoon Kim, Jae Sik Choe, Sa Son Sin, Ko Geun Oh, Eugn Chang Lee and Yong Hae Lee. Petitioners are Korean nationals who were shipped to Japan during World War II and forced to work under inhumane conditions for various private corporations, all of whom now are or have affiliates or successors doing business in the State of California.

The defendant corporations in *Kim*[1] are: Ishikawajima Harima Heavy Industries Company, Ltd., IHI, Inc., Sumitomo Heavy Industries Ltd., and Sumitomo Heavy Industries (USA), Inc.

The defendant corporations in *Choe*[2] are: Nippon Steel Corporation, Nippon Steel U.S.A., Inc., Mitsubishi Heavy Industries, Ltd, Mitsubishi Heavy Industries America, Inc.

The defendant corporations in *Sin*[3] are: Mitsui & Co., Ltd., Mitsui & Co. (USA), Mitsui Engineering & Shipbuilding Co., Ltd, and Paceco Corporation.

And the defendant corporations in *Oh, Lee and Lee*[4] are: Mitsui & Co., Ltd., Mitsui & Co. (USA), Mitsubishi Corporation, Mitsubishi International Corporation, Mitsubishi Heavy Industries America, Inc., Mitsubishi Heavy Industries America, Inc., Mitsubishi Materials Corporation, Mitsubishi Materials USA Corporation, Nippon Steel Corporation, Nippon Steel U.S.A., Showa Denko America, Inc., and Showa Kogyo.

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1. *Kim v. Ishikawajima Harima Heavy Indus. Co., Ltd.*, No. CV-99-05303-VRW.

2. *Choe v. Nippon Steel Corp., et al.*, No. CV-99-05309-VRW.

3. *Sin v. Mitsui & Co., Ltd., et al.*, No. CV-00-03242-VRW.

4. *Oh, et al. v. Mitsui & Co., Ltd., et al.*, No. CV-00-03752-VRW.

Petitioners filed their respective complaints in California state courts, which Defendants removed to federal district court. Subsequently, the Judicial Panel on Multidistrict Litigation ("MDL Panel") transferred the cases to Judge Walker in the Northern District of California. Eventually, some 31 cases brought by former Allied prisoners of war and Korean, Chinese, Dutch and Filipino civilian internees were consolidated before Judge Walker and dismissed in a series of orders issued during 2000 and 2001. The United States Court of Appeals for the Ninth Circuit affirmed all of the dismissals in a single decision that is the subject of this Petition.

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Appendix B — Order Of The United States District Court For The Northern District Of California Filed September 17, 2001 ..... 42a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, *see* Appendix ("Apdx.") A, is reported at 317 F.3d 1005 (9th Cir. 2003) and cited herein as "Slip Op." The relevant opinion of the district court is reprinted at Apdx. B, and reported at *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160 (N.D. Cal. 2001).

JURISDICTION

The court of appeals entered its decision on January 21, 2003, and on March 6, 2003, amended that decision and denied petitions for rehearing and for rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Pursuant to Supreme Court Rules 14(1)(e)(v) and 29(4)(c), Petitioners state that the constitutionality of a California state statute is at issue in their Petition and, thus, 28 U.S.C. § 2403(b) may apply. Defendants below notified the Attorney General of the State of California that they challenged the constitutionality of a California state statute and the Attorney General responded by submitting *amici* briefs supporting Petitioners to the district court and the Ninth Circuit in this litigation.

PERTINENT STATUTORY PROVISIONS

The complete text of Cal. Code Civ. Proc. § 354.6 is set forth in full in the Ninth Circuit opinion (Apdx. A), Slip Op. at 10a-12a.

STATEMENT OF THE CASE

Petitioners respectfully suggest that the Ninth Circuit's decision in this case so radically departs from this Court's teachings as to warrant the grant of *certiorari*. Indeed, notwithstanding that since the founding of this United States our courts have had innumerable

opportunities to examine when state action impermissibly interferes with exclusive federal jurisdiction over foreign affairs, and have developed a nuanced jurisprudence to resolve such questions, in this case the Ninth Circuit shoved all that aside and struck out on its own. In doing so, it erred ***and*** unleashed an imprudent new rule capable of great mischief.

At issue here is a California ***procedural*** statute that modified the applicable statute of limitations in suits that might be brought ***by private parties against private parties***. It applies specifically to individuals who were forced to slave for private corporations operating in Japan or Germany during World War II. Section 354.6 of the California Code of Civil Procedure, unanimously enacted by the California Legislature in 1999, allows these former slave-labor victims to assert damage claims under state law against any such corporation that is currently doing business itself or through an affiliate in the State of California.

Under the foreign-affairs jurisprudence developed by this Court and the lower federal courts (*see infra* at 8-16), the California statute does not intrude on federal foreign-affairs powers. Rather, it serves the limited capacity of regulating the conduct of litigation – a power that is well within the traditional province of the states. The mere fact that ***some*** (but not all) of the defendants are foreign (Japanese) corporations does not implicate the foreign-affairs power. Any impact this litigation involving ***private parties*** might have on foreign ***countries*** is far too incidental to warrant a finding of unconstitutionality, especially because it involves the conduct of private companies acting under governmental regimes (and laws) that have long-since disappeared. *See infra* at 16-21.

Although the Ninth Circuit should have applied this sort of foreign-affairs analysis to evaluate the California statute at issue here, it did not. The court paid lip service to the proper analysis, but then declined to employ it, fashioning instead a wholly novel and unprecedented rule that guts any state law addressing a matter somehow "related to war." The court discerned an exclusive federal

power to wage, conclude and avoid wars, and gave this power such sweeping breadth as to encompass much of what others consider to be federal "foreign-affairs" powers. The Ninth Circuit then categorically deemed all matters that somehow relate to these sweeping war powers to be exclusively a federal power. It was then a small step for the court to find that the California statute interfered with this power. *See infra* at 21-28.

But the Ninth Circuit had no basis to bypass the foreign-affairs analysis crafted by this Court and developed by the lower federal courts. Under that analysis – the only legitimate analysis – the California statute is constitutionally valid. This case involves thousands of innocent Korean civilian internees who were the victims of defendants' slave-labor programs and inhumane treatment, and these victims deserve better than the Ninth Circuit's dubious decision. Moreover, although this Court soon will likely be issuing a decision amplifying on the foreign-affairs test,[5] there is no reason to expect that decision to address the Ninth Circuit's novel war-powers rule. Yet the breadth and inflexibility of that new rule promises to make mischief wherever a defendant can challenge a state claim or statute as somehow being "related to war." *See infra* at 28-30. For the reasons stated herein, this Court should grant the petition for writ of *certiorari*.

A. Petitioners were enslaved and treated inhumanely by the defendant private corporations

This case arises from the use of Korean civilians for forced labor by Nippon Steel Corporation, Mitsubishi Heavy Industries, Ltd., Sumitomo Heavy Industries, Ltd., Mitsui and Co., Ltd., Showa Kogyo, and the numerous other private corporations listed *supra* at ii. Petitioners were Korean nationals at the time the alleged wrongs occurred, but are now residents of California

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5. *American Insurance Ass'n v. Low*, 02-722 ("*Low*") (oral argument held on April 23, 2003).

and Washington. *E.g.*, *Kim* Complaint ¶ 9 (ER 3); *Choe* Complaint ¶ 9 (ER 35).

Petitioners, like thousands of other Korean nationals, were enslaved and forced to work for private corporations during the Second World War. As detailed in the complaints, hundreds of thousands of Koreans were conscripted by Japanese industry and forced to work for little or no pay in unspeakable conditions in mines, factories, construction sites and other industrial settings. They were enslaved, kept under guard in deplorable housing and inadequately fed, and beaten by their industrial captors. *E.g.*, *Kim* Compl. ¶¶ 9, 39-40, 44, 45-55, 57-75 (ER 3, 13, 15-23); *Choe* Compl. ¶¶ 9, 39-40, 44, 45-55, 57-75 (ER 35, 45, 45-55).

The experience of Plaintiff Jae Sik Choe is typical. In 1943, when he was 20 years old, Mr. Choe was duped into traveling to Japan with promises that he would be able to work for a private Japanese company for good wages and in good conditions. Instead, he was shipped first to Yawata Steel Works (now Nippon Steel), and then to Mitsubishi Heavy Industries, where he was starved and forced to work inhumane hours under brutal conditions for little or no wage. At Yawata Steel Works, Mr. Choe was forced to work from sun-up to sundown six days a week with few breaks. He was ordered to bunk in a single large building into which Yawata jammed approximately one thousand steel workers. He was under guard during work and in the lodging. Medical care was bare, and he was given three yen per month – approximately 2 cents in U.S. currency today – for his personal needs. Mr. Choe escaped at one point but, lacking money to return to Korea, was forced to surrender. He was then transferred to a port near Okayama, Japan, where he was again forced into servitude by Mitsubishi Heavy Industries, this time working underground digging a tunnel.

While these allegations must be taken as true on a pleading motion, they are also supported by substantial historical evidence. Historians acknowledge that "700,000 Koreans and 40,000 Chinese . . . were forcibly brought to Japan and sent to work in

factories and mines."[6] An official list identifies more than 50 Japanese companies that used slave labor during World War II.[7] "Almost six million Koreans were drafted as soldiers and/or forced laborers" before and during World War II, "representing approximately twenty percent of Korea's population."[8] Korean historians "estimate that 5.4 million Koreans were forcibly conscripted by the Japanese between 1939 and 1945. Many Koreans were put into coal mines."[9]

B. Nature of the Case and Proceedings Below

Thirty-one cases were consolidated before the district court, each involving claims against private corporations for forced labor and involuntary servitude in Asia during the Second World War. This Petition is filed on behalf of the plaintiffs in four of those cases, which were brought as class actions on behalf of Korean civilian forced-labor victims, and consolidated on appeal by the Ninth Circuit. *See Suk Yoon Kim v. Ishikawajima Heavy Industries, Ltd., et al.*, Nos. 01-17201, *et al.*, Order (9th Cir. Nov. 26, 2001).

Petitioners all were Korean civilians at the time of the wrongs alleged. They are today citizens of the Republic of Korea or are naturalized U.S. citizens residing in Korea, California, and Washington.[10] Defendants are 19 Japanese corporations (and their

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6. Kyeyong Park, *The Unspeakable Experiences of Korean Women Under Japanese Rule*, 21 WHITTIER L. REV. 567, 572 (2000) (citing Hyun Sook Kim, *History and Memory: The "Comfort Women" Controversy*, 5 Positions 73, 85 (1997)).

7. Linda Goetz Holmes, UNJUST ENRICHMENT: HOW JAPAN'S COMPANIES BUILT POSTWAR FORTUNES USING AMERICAN POWS, 149 (2001).

8. Park, *supra*, 21 WHITTIER L. REV. at 579.

9. Arnold C. Brackman, THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS, 253 n. (1987).

10. Plaintiff Suk Yoon Kim was a Korean civilian and today is a resident of California. Plaintiffs Jae Sik Choe and Sa Son "Sindo" Sin were Korean civilians, and today are residents of the State of Washington. Plaintiffs Do Geun Oh, Eung Chang Lee and Yong Hae Lee are both citizens and residents of the Republic of Korea.

U.S. subsidiaries) doing business in California that forced Petitioners and other Korean civilians to work as forced laborers.

These are private lawsuits, brought by private plaintiffs, against private businesses, for universally condemned wrongs. Petitioners do ***not*** seek "war reparations" or any other damages or relief from the government of Japan – or from any governmental agency of Japan. They instead seek compensatory damages and restitution only from the private entities that enslaved them and other Korean civilians – corporations with a substantial presence in the State of California.

Concerned that courthouse doors were being closed to aging victims of World War II-era slave labor, in 1999 the California Legislature enacted Cal. Code Civ. Proc. ("C.C.P.") § 354.6, to provide that any World War II "slave labor" or "forced labor victim" may "bring an action to recover compensation" from any "entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate," provided the action is filed by December 31, 2010. C.C.P. § 354.6 (set forth fully in Apdx. at 11a-12a). That statute provides the focus of this appeal.

Subsection (b) of § 354.6 provides that forced-labor victims (as defined in § 354.6(a)), or their heirs, "may bring an action to recover compensation for labor performed, . . . from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate" – *i.e.*, business corporations – in any "superior court of this state, which court shall have jurisdiction over that action until its completion or resolution." C.C.P. § 354.6(b). Subsection (c) provides, "[a]ny action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitations, if the action is commenced on or before December 31, 2010." C.C.P. § 354.6(c).

The California Legislative Counsel's Digest to the bill that became § 354.6 noted that "[e]xisting law authorizes actions to recover wages but requires various actions to be brought within specified periods of time." Cal. S.B. 1245 at 1 Legislative Counsel's

Digest (Feb. 26, 1999). Viewing the statute as ***procedural*** in character, the California Legislature placed it in the Code of Civil Procedure under Title Two: Time of Commencing Civil Actions, Chapter 4: General Provisions as to the Time of Commencing Actions. *See* C.C.P. Title II, Ch. 4, § 354.6.

The "Statutory Notes" accompanying § 354.6 explain that the Legislature's purpose was to extend any statutes of limitation on World War II forced-labor claims, so that victims might get a hearing on claims against firms presently doing business in California that used forced labor as the basis for their current wealth. "These victims of Nazi persecution," thousands of California residents among them, "have been deprived of their entitlement to compensation for their labor and for injuries sustained while performing that labor as forced or slave laborers prior to and during the Second World War." Cal. Stats. 1999, c.216 § 1(a)-(b) (S.B. 1245) (codified as notes to C.C.P. § 354.6). Those individuals should be "given a reasonable opportunity to claim their entitlement to compensation for forced or slave labor performed prior to and during the Second World War." *Id.* § 1(c). "To the extent that the statute of limitations applicable to claims for compensation is extended by this act," the Notes continue, "that extension of the limitations period is intended to be applied retroactively, irrespective of whether the claims were otherwise barred by any applicable statute of limitations under any provision of law prior to the enactment of this act." *Id.* § 1(d).

Petitioners, as victims of World War II-era forced labor, filed suits that are timely under § 354.6, asserting state-law claims against the companies that had enslaved them and profited from their labor.

The district court dismissed all of Petitioners' claims on defendants' motions to dismiss and for judgment on the pleadings under Fed. R. Civ. P. 12(b)(6) and 12(c). Judge Walker of the Northern District of California acknowledged that Petitioners alleged valid torts, held that "forced labor violates the law of nations," and stated that it was "beyond doubt that the forced labor practices of defendants during the Second World War violated traditional international law." Apdx. at 77a. Noting that the Republic of Korea

was not a signatory to the Allied Powers' 1951 Treaty of Peace with Japan, he held that the "plain text" of the Treaty cannot bar their claims, and that American foreign policy, as reflected in the Treaty, neither preempts nor conflicts with the California statute and "does not trump the California law." Apdx. at 52a.

Nonetheless, Judge Walker ruled § 354.6's extension of the time to sue unconstitutional – on the ground that it infringes upon the foreign-affairs power of the United States, a rarely invoked and ill-defined implied-preemption doctrine. Judge Walker did so based on his interpretation of *Zschernig v. Miller*, 389 U.S. 429 (1968), the first, and only, case in which this Court applied foreign-affairs preemption to invalidate a state law. Having ruled § 354.6 unconstitutional, Judge Walker then held Petitioners' state-law claims all "barred by the applicable statutes of limitations." Apdx. at 82a.

The Ninth Circuit affirmed the district court's dismissal. Although Petitioners are private parties suing private corporations under well-established California law, the Ninth Circuit found that their claims were constitutionally infirm for interfering with exclusive federal power to make and resolve war. As a result, the appellate court found Petitioners' claims preempted by the "Foreign Affairs Power." Slip Op., Apdx. at 20a-28a.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's New "War Powers" Rule Is A Radical Expansion of The "Foreign Affairs" Doctrine And An Unprecedented Intrusion On State's Rights

The Ninth Circuit held that "Section 354.6 runs afoul of the restriction on the exercise of foreign affairs powers by the states," both for creating a state right of action and for extending the limitations period to resurrect otherwise stale claims. Slip Op., Apdx. at 32a. The court ruled that California laws – whether C.C.P. § 354.6 itself or other common-law claims – that would provide hope for relief to wartime victims of slavery or forced labor constitute an unconstitutional interference with federal power over foreign affairs and all matters relating to war. But granting access to California

courts to victims (including California residents) of foreign corporations' slave- or forced-labor programs does not tread on federal authority.

1. A state can allow private claims against a local corporation for misconduct committed by a foreign affiliate without intruding on federal authority over foreign affairs

a. Under this Court's decisions, the foreign-affairs doctrine is rarely invoked to invalidate state action

The foreign-affairs doctrine would not block state-law claims against a private corporation doing business in the forum state for unpaid wages or tortious acts arising from misconduct committed by that corporation or its affiliate in another country. Such a case would not run afoul of the federal government's constitutional authority over foreign affairs. The rarely invoked doctrine of foreign-affairs preemption is a "dormant preemption" doctrine that courts have implied from the federal government's constitutional authority to enter into treaties and otherwise conduct foreign affairs. *Gerling Global Reinsurance Corp. v. Low*, 240 F.3d 739, 751 n.9 (9th Cir. 2001), *cert. petition granted sub nom, Am. Ins. Ass'n v. Low*, 154 L. Ed. 2d 768, 123 S. Ct. 817 (2003). "The power is rarely invoked by the courts; the Supreme Court has not applied it in more than 30 years." 240 F.3d at 751. Importantly, before the present litigation, ***no court has applied the doctrine to dismiss a private plaintiff's state-law claim for tortious misconduct.*** This Court has applied it sparingly, employing it only once to invalidate a state probate law. *See Zschernig v. Miller*, 389 U.S. 429 (1968); *see* Slip Op., Apdx. at 19a; *Int'l Ass'n of Indep. Tanker Owners v. Locke*, 148 F.3d 1053, 1069 (9th Cir. 1998) (*Zschernig* was "[t]he only case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power"), *rev'd on other grounds, sub nom.*, 529 U.S. 89 (2000).

In *Zschernig*, this Court held that an Oregon probate law allowing foreign citizens to inherit from a decedent's estate only if

U.S. citizens could inherit from decedent's estate in a foreign citizen's country violated the "foreign affairs" power because, as applied, it allowed Oregon state court judges to insult foreign nations and conduct detailed inquiries into those nations' laws and their governments' administrations. 389 U.S. at 433-35. As the Ninth Circuit observed in this case, the test under the foreign-affairs doctrine set forth in *Zschernig* and its predecessor is that

> a statute does not violate the constitution where it merely has "some incidental or indirect effect in foreign countries."

Slip Op., Apdx. at 18a-19a (citing *Clark v. Allen*, 331 U.S. 503, 517 (1947)).

The Oregon probate law failed this test in *Zschernig* because it had the proscribed direct effect on foreign countries. Under it and similar state laws passed elsewhere during the Cold War era, state probate courts had

> launched inquiries into the type of governments that obtain in particular foreign nations – whether aliens under their law have enforceable rights, whether the so-called 'rights' are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation.

Zschernig, 389 U.S. at 433-34. Accordingly, *Zschernig* reasoned, the ensuing probate decisions "radiate some of the attitudes of the 'cold war,' where the search is for the 'democracy quotient' of a foreign regime as opposed to the Marxist theory." *Id.* at 435.

The Oregon courts, applying that state's probate law, had opened "minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds

should 'not preclude wonderment as to how many may have been denied "the right to receive". . . .'" *Id.* As a result, this Court continued,

> As one reads the Oregon decisions, it seems that . . . the freezing or thawing of the "cold war," and the like are the real desiderata. Yet they of course are matters for the Federal Government, not for local probate courts. [*Id.* at 437-38 (footnote omitted).]

Because only the federal government, and not the states, may determine whether, when, and how to coerce another nation to change its laws and policies, *Zschernig* concluded that the Oregon probate law, as applied, went too far.

By contrast, this Court held in *Clark v. Allen*, 331 U.S. 503, 517 (1947), that a California probate law with a similar reciprocity provision did not, on its face, violate the U.S. Constitution because the statute had only "some incidental or indirect effect in foreign countries." In that case, a California resident, within weeks of the December 1941 declaration of war on Germany, bequeathed her entire estate to relatives who were German nationals, as permitted by a California state law that predated the Second World War. Several disaffected family members challenged the will. Then the Alien Property Custodian impounded the estate in 1943 pursuant to the Trading With the Enemy Act and sought a determination that his interest in the estate was superior to that of the executor and other potential heirs. The Court responded to the claim that the California statute "is an extension of state power into the field of foreign affairs, which is exclusively reserved by the Constitution to the Federal Government." 331 U.S. at 516. Observing that California law determined rights of succession of property and that the California statute was neither preempted by "different or conflicting arrangements" at the federal level or treaties with another country, this Court held that the statute did ***not*** impermissibly intrude into the field of foreign affairs:

> [w]hat California has done will have some incidental or indirect effect in foreign countries. But that is true of

many state laws which none would claim cross the forbidden line. [*Id.* at 517.]

b. Under *Clark* and *Zschernig*, the lower federal courts only invalidate state laws that coerce a specific foreign government

Applying the analysis formulated by this Court in *Clark* and *Zschernig*, the lower federal courts have not invalidated ***any*** state law not directed against a particular foreign government under the foreign-affairs doctrine. For example, in *Trojan Tech. v. Pennsylvania*, 916 F.2d 903 (3d Cir. 1990), a Canadian corporation argued that a Pennsylvania "Buy American" law violated the "foreign affairs" power. The Third Circuit held that the statute did not violate the "foreign affairs" power, reasoning that "any state law that involves the state in the ***actual conduct of foreign affairs*** is unconstitutional," but "any action that has only ***some incidental or indirect effect*** in foreign countries" is not. *Id.* at 913 (quoting *United States v. Pink*, 315 U.S. 203, 233 (1942), and *Zschernig*, 389 U.S. at 432) (emphasis added, internal quotation marks omitted)). The court stated that Pennsylvania's "Buy American" statute "exhibits none of the dangers attendant on the [Oregon probate statute] reviewed" in *Zschernig* because the statute provided no opportunity for Pennsylvania state officials to comment on the nature of foreign regimes. On its face, the Pennsylvania statute did not single out any particular foreign country; there was no evidence that the statute had been applied selectively according to attitudes concerning foreign policy; and there was evidence that Congress had recently directed its attention to "Buy American" statutes, but took no steps to preempt them. 916 F.2d at 913-14.

Likewise, in *Gerling v. Low*, 240 F.3d at 751, the Ninth Circuit applied *Zschernig* to vacate a district court injunction barring enforcement of California's Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"), Cal. Ins. Code §§ 13800-07. HVIRA, like Code Civ. Proc. § 354.6, was part of the California legislative scheme addressing unresolved injuries arising in the years just before and

during the Second World War.[11] While § 354.6 focused on the use of slave labor under "the Nazi regime, its allies and sympathizers," HVIRA addressed insurance companies' refusal to pay to survivors the proceeds of Nazi-era policies sold to Jewish Europeans. *See Gerling*, 240 F.3d at 742-43. Under HVIRA, companies that sold insurance policies in Europe from 1929-1945 were required to file information about those policies with the California Insurance Commissioner. *See id.* The intent of HVIRA, as well as Code Civ. Proc. § 354.6, was to right World War II-era wrongs. According to *Gerling*, "by enacting HVIRA, California's legislature intended to help California residents recover on unpaid policies that were entered into in foreign countries" and "protect its residents from insurance companies that have not paid valid insurance claims." *Id.* at 745. In that statutory scheme, as here, California established a means for victims to recover compensation for World War II-era injustices. *See id.*[12]

A California district court in *Gerling* enjoined enforcement of HVIRA, ruling that it "violates the federal government's power over foreign affairs" because it "has the potential to 'disrupt and embarrass' the federal government in the field of foreign relations." *Id.* at 751 (quoting district court's opinion). The district court looked to this Court's decision in *Zschernig* in ruling that HVIRA's focus

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11. Cal. Code Civ. Proc. § 354.5, enacted at the same time as HVIRA, allows persons to bring claims for the payment of World War II Holocaust era insurance policies and extends the statute of limitations on such claims until Dec. 31, 2010. In *Gerling*, the California Commissioner of Insurance filed a motion to dismiss, arguing that the insurers did not have standing to challenge § 354.5; the district court agreed, holding that the insurers had not established an imminent threat of prosecution under that statute. On appeal to the Ninth Circuit, the insurers did not challenge that ruling. 240 F.3d at 743.

12. Further, as in § 354.6, the California Legislature also extended the limitations period for filing claims to recover on unpaid policies and authorized the state to suspend licenses of companies that did not pay Holocaust-era claims. Those provisions were not before the court in *Gerling*. *See id.*

on providing relief for Holocaust victims asserted an "exercise [of] a power exclusively entrusted to the national government," which "not only affects international relations, but also has 'great potential for disruption or embarrassment.'" *Gerling Global Reinsurance Corp. of Am. v. Quackenbush*, 2000 U.S. Dist. Lexis 8815, at *21, *27 (E.D. Cal. June 9, 2000), *rev'd in pertinent part*, 240 F.2d 739 (9th Cir. 2001). It could only do so, according to the district court, by meddling with ongoing negotiations being carried out by the U.S. State Department and a U.S.-Swiss Joint Economic Commission addressing the same Holocaust-insurance issue. *See id.* at *27. The district court also found that HVIRA might conflict with German law and was "inconsistent with several of the national government's statements, policies, and promises." *Id.* at *35. Citing *Zschernig*, the district court held that it was probable HVIRA violated the federal foreign-affairs power. *Id.* at *43.

The Ninth Circuit reversed the California district court's decision invalidating HVIRA. It "disagree[d] as a matter of law," holding that the district court "erred when it decided that HVIRA violates . . . the foreign affairs power." *Gerling*, 240 F.3d at 751, 754. The Ninth Circuit was "not persuaded that *Zschernig* applies to HVIRA," reasoning that in *Zschernig*, the Oregon statute "violated the foreign affairs power because, ***as applied***, it allowed Oregon judges to insult foreign nations." *Id.* at 753 (emphasis in original). But HVIRA had no history of improper application, nor did it require qualitative evaluations of foreign governments' laws or policies. Nor did it target any particular country. *Id.* In *Gerling*, the Ninth Circuit also rejected the argument that HVIRA interfered with the federal government's ability to "speak with one voice." 240 F.3d at 746 (citing *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 329-30 (1994)). The Ninth Circuit also stated that HVIRA does not even target governmental entities:

> HVIRA regulates insurance companies that do business in California and are, or are related to, companies that issued Holocaust-era insurance policies. No Plaintiff is

> a foreign government, nor is any Plaintiff owned in whole or in part by a foreign government; they are, simply, businesses. [*Id.* at 753.]

The Ninth Circuit concluded that "[b]ecause *Zschernig* has been applied so sparingly, . . . we hesitate to apply *Zschernig* to a facial challenge to state statutes involving 'foreign affairs' (a) but that mainly involve foreign commerce and (b) that are not directed at a particular country." *Id.* Federal power over foreign affairs, a interpreted by *Zschernig*, did not invalidate the statute. *Id.*

By contrast, state statutes that specifically target a foreign government have been invalidated in decisions relying on *Zschernig* and federal power over foreign affairs. For example, the First Circuit applied *Zschernig* to strike a state law – the "Massachusetts Burma Law" – that specifically targeted one country and its government. *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd on other grounds sub nom., Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). The Massachusetts Burma Law was designed to coerce Burma[13] to change its domestic policy by barring state agencies in the U.S. from purchasing goods from companies that did business with Burma. On its face, the Massachusetts statute directly regulated current American trade with Burma in order to exert pressure on the Burmese government. 181 F.3d at 50. But even then, reflecting how sparingly this Court has employed the foreign-affairs preemption, this Court did ***not*** address the circuit court's foreign-affairs analysis on certiorari, affirming instead on other grounds. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000); *see Gerling v. Low*, 240 F.3d at 752 (noting that in *Crosby*, the Supreme Court "did not rule on the foreign affairs question").

Likewise, in *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1367 (D.N.M. 1980), in an effort to retaliate against the regime that had taken control of Iran for the then-ongoing Iranian

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13. Although Burma changed its name in 1989 to Myanmar, the *Natsios* parties, court and the state statute used its previous name. 181 F.3d at 45 n.1.

hostage crisis, a state university took steps to "to rid the campus of Iranian students." As in *Natsios*, the state's aim was to coerce an existing foreign government and, in so doing, it interfered with federal efforts to resolve the international dispute and obtain the hostages' release. *Id.* at 1376, 1378-79.

Finally, two state courts have invalidated laws that restricted commerce with the Republic of South Africa in order to discourage that country's policy of apartheid. In *Springfield Rare Coin Galleries, Inc. v. Johnson*, 115 Ill. 2d 221, 503 N.E.2d 300, 307 (1986), the Illinois Supreme Court struck down a discriminatory tax on coins imported from South Africa, and in *New York Times Co. v. New York Comm'n on Human Rights*, 41 N.Y.2d 345, 361 N.E.2d. 963, 968 (1977), the court invalidated a New York City Commission ruling that prohibited publication of employment advertisements about South Africa. These courts found that state laws imposing embargoes interfered with ongoing trade relations and were designed to coerce the government of a single country, South Africa, to change its policies. *Johnson*, 503 N.E.2d at 307; *New York Times*, 361 N.E.2d at 968-69.

c. Section 354.6 coerces no foreign government and seeks relief only for private misconduct

Code Civ. Proc.§ 354.6, by contrast, encompasses none of the several features of various states' laws that have triggered foreign-affair preemption in other cases. Unlike the Oregon probate statute reviewed by this Court in *Zschernig*, § 354.6 does not require or encourage the California state courts to investigate or evaluate the laws or policies of any foreign government. The statute provides no mechanism for state courts to coerce foreign governments to change current or future policies.

Instead, § 354.6 is strictly retrospective, ***applying in this case to address injuries committed by private actors under World War II-era governments or political regimes that no longer exist***. The California statute authorizes no inquiry into the government of any foreign nation. Nor does it – or this suit – target any

government's current policies. Indeed, Japan's current constitution condemns slavery,[14] and Petitioners certainly do not seek to change that with their lawsuits. These actions seeking to recover damages have little, if anything, to do with Japan's government, which is not a defendant, or its policies, which are not in issue.[15]

Nor does § 354.6 target any particular country, another key factor in applying the foreign-affairs preemption. Like the statutes at issue in *Trojan* and *Gerling*, which did "not refer to any particular country," *Trojan*, 916 F.2d at 913-14; *Gerling*, 240 F.3d at 753, § 354.6 does not focus on any single country. If anything, § 354.6 sweeps wider than HVIRA – which narrowly targets the Nazis' European victims only. *See Gerling*, 240 F.3d at 742-43. Section 354.6, by contrast, encompasses ***all*** slave and forced-labor victims under "the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers." C.C.P. § 354.6(a)(2). This provision permits legal actions to be brought against any company, incorporated ***anywhere***, that has sufficient contacts with the State of California and used slave labor or forced labor in covered countries.

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14. Japan Const. art. 18, provides: "[n]o person shall be held in bondage of any kind. Involuntary servitude, except as punishment for crime, is prohibited."

15. Any question of whether § 354.6 might be found unconstitutional in another context, such as in an action naming the Japanese, German, Italian, or other governments as defendants, does not invoke preemption ***in this case*** against private corporations. Again, the defendants in these cases are "firms presently doing business in California" that used World War II-era slave or forced labor that "served as the basis of ill-gotten wealth." Cal. Stats. 1999, c.216 § 2 (S.B. 1245) (codified as a note to § 354.6). Petitioners name no governmental entity – past or present – as a defendant. As in *Gerling*, it is significant here that "[n]o Plaintiff is a foreign government, nor is any Plaintiff owned in whole or in part by a foreign government; they are, simply, businesses." 240 F.3d at 753.

Indeed, even American companies doing business in California could be sued under § 354.6 if they used forced labor under the conditions set forth in the statute. For example, the Ford Motor Company has admitted that its German subsidiary used slave labor in the 1940s. *See* Martin Crutsinger, *U.S. To Create War Reparation Fund*, ASSOCIATED PRESS ONLINE, May 1, 2000. Also during World War II, General Motors, through its Opel subsidiary, forced thousands of slave laborers to manufacture trucks and aircraft used by the German military. *Id.* Coca-Cola, Exxon-Mobil and Kodak are also "among a growing number of American multinationals that say they have found evidence that their subsidiaries used forced labor" in Europe during the World War II era.[16] Thus, contrary to the Ninth Circuit's conclusion in this case, § 354.6 cannot be said to single out any particular country.

Next, § 354.6, as applied to Petitioners' claims, seek damages only from ***private actors*** that conduct business in California. Defendants are private companies that operated mines and shipyards, made cement, and manufactured munitions and armaments during the Second World War. In Mr. Kim's case, for example, defendants were private heavy-equipment manufacturers that operated shipyards where he was forced to work. The fact that

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16. Joseph Kahn, *U.S. Firms Plan Fund for Victims of Hitler; Move Partly Aimed at Heading Off Lawsuits*, CHICAGO TRIBUNE, Apr. 30, 2000, at C11. *See generally* John Friedman, *Hitler's Willing Executives*, THE NATION, May 21, 2001, at 40 (book reviews); Ron Grossman, *A Dark History: Did IBM Help The Nazis Tally Their Victims?*, CHICAGO TRIBUNE, Mar. 25, 2001, at C5 (book review); Reinhold Billstein, Karola Fings, Anita Kugler and Nicholas Levis, WORKING FOR THE ENEMY: FORD, GENERAL MOTORS, AND FORCED LABOR IN GERMANY DURING THE SECOND WORLD WAR (Berghahn 2001); Edwin Black, IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION (Crown 2001); Christopher Simpson, THE SPLENDID BLOND BEAST: MONEY, LAW AND GENOCIDE IN THE TWENTIETH CENTURY (New York: Grove Press, 1993); Tom Hayden, *Ex-Slave Laborers Deserve Far Better; Holocaust: Rich Firms Get Good Press With Token Payments, But What About the Victims?*, L.A. TIMES, Dec. 30, 1999, at B11.

these private companies' violations of law were committed during wartime does not somehow transform it into state action. Governments prosecute wars pursuant to their inherent wartime powers. Private companies do not, however, and instead must conform their business activities to the wartime demands of their government. See, for example, *Highland v. Russell Car & Snow Plow Co.*, 279 U.S. 253, 262 (1929) (government could impose price on private companies for fuel as alternative to expropriation in support of war effort); *Brown v. Wright*, 137 F.2d 484, 489 (4th Cir. 1943) (wartime price controls were legitimate exercise of government's war powers).

Moreover, in *Kawakita v. United States*, 343 U.S. 717, 727-28 (1952), this Court held that private Japanese companies retained their status as profit-making ventures during World War II. *Kawakita* affirmed the treason conviction of a U.S. citizen who, while living in Japan during World War II, served as an interpreter for a private Japanese company and mistreated American POWs whom that company was using as slave laborers. In his defense, Kawakita asserted that he had renounced his citizenship before committing the acts in question, which provided aid and comfort to the Japanese war effort. As evidence of his renouncement, Kawakita cited his work as an interpreter for a private Japanese company that was supporting the Japanese government's war effort and that used American POW labor, claiming that this Court should deem this work as being performed for the Japanese government. This Court declined to do so, instead confirming that a private business remains so, notwithstanding wartime circumstances, unless the government seizes the company:

> The regulation of the company by the Japanese government, the freezing of its labor force, the assignment to it of prisoners of war under military command were incidents of a war economy. But we find no indication that the Oeyama Company was nationalized or its properties seized and operated by the government. ***The evidence indicates that it was***

> ***a part of a regimented industry; but it was an organization operating for private profit under private management.*** [*Id.* (emphasis added).]

Kawakita applies here as well. No private corporation named as a defendant in Petitioners' actions argues that the wartime government of Japan nationalized it or seized and controlled its assets before or during World War II. None of these corporations disputes that it continued to operate as a private entity during the Second World War. Accordingly, in their lawsuits Petitioners seek to recover damages only for the misconduct of ***private*** actors. No actions of the Japanese government – past or present – is at issue in these cases.

Further, even though the present Japanese government may be displeased that Japanese corporations doing business in California may be held to account under California law for past misdeeds, no authority holds that this displeasure is a matter of "foreign relations" rendering the California law constitutionally infirm. *Zschernig* held that the mere "possibility that any holding may disturb a foreign nation – whether the matter involves commercial cases, tort cases, or some other type of controversy," ***does not preclude a state court from applying the law and passing judgment***. 389 U.S. at 433; *see also id.* at 461 (Harlan J., concurring). Indeed, if the fact that a foreign government might be "disturbed" whenever one of its country's corporations is sued in the U.S. triggered foreign-affairs preemption, then any state law or regulation with some extraterritorial economic impact would be at risk. Such a construction would radically shift the balance between the states and federal government, stripping states of the power to make laws that have any foreign impact.

The better rule was stated by this Court in *Clark* and *Zschernig*, and echoed by the circuit courts in *Trojan* and *Gerling*, namely, that while it is true that "any state law that involves the state in the actual conduct of foreign affairs is unconstitutional," "any action that has only ***some incidental or indirect effect*** in foreign countries" does not intrude on the foreign-relations power. *Zschernig*, 389

U.S. at 432 (emphasis added); *see also Trojan*, 916 F.2d at 913; *Gerling*, 240 F.3d at 752; *see supra* at 12. Even if § 354.6 may have some "incidental or indirect effect" in Japan, like the state statutes at issue in *Trojan* and *Gerling*, it does ***not*** involve the State of California in the actual conduct of foreign affairs. As in *Gerling*, § 354.6 involves mainly business corporations and commerce, and the California statute is not directed at a particular foreign country. As in *Trojan* and *Gerling*, this Court's decision in *Zschernig* does not invalidate the statute.

Also, as in *Trojan* and *Gerling*, § 354.6 has no history of abuse by California state-court judges, unlike the Oregon probate statute invalidated in *Zschernig*. In cases brought by Korean and Chinese slave labor victims that are pending in the California state courts, no state trial or appellate court judge has used § 354.6 to impugn Japan, or any other foreign government for that matter. Nothing on the statute's face suggests that any judge will do so.

In short, like the HVIRA statute at issue in *Gerling v. Low*, Petitioners assert damage claims against private businesses – the ones that forced them to work and do so under atrocious conditions – for unpaid wages and other relief. Targeting only those businesses that now conduct multi-million dollar operations in California with the profits they derived from using slave and forced labor during World War II, § 354.6 simply does not seek to regulate foreign trade. Neither does it implicate current foreign policy or target any acts of the current government of Japan. Only defendants' acts as private businesses are at issue in these cases, and any judgment entered against them will stem from those acts ***only***. Therefore, Petitioners' claims do not interfere with federal power on foreign affairs.

2. The wartime context of Petitioners' state-law claims does not render them unconstitutional

Notwithstanding these undisputed predicate facts, the Ninth Circuit held that the California statute is constitutionally infirm for intruding on federal power over foreign affairs because the defendant corporations' misconduct occurred during wartime. The court did not, however, directly affirm the district court's conclusion that

§ 354.6 violates federal authority over foreign affairs. Although this issue dominated the parties' briefing before the Ninth Circuit on the consolidated appeals, the court sidestepped it. Slip Op., Apdx. at 22a-23a. The Ninth Circuit held instead that the fact that the corporations' alleged misconduct occurred during wartime invoked a particularly potent facet of the federal government's foreign-affairs powers – the "power to make and resolve war, including the procedure for resolving war claims." Slip Op., Apdx. at 23a. According to the court, this war power "is central to the foreign affairs power in the constitutional design." *Id.* at 26a. The Ninth Circuit further decreed that only the federal government can address "[m]atters related to war," and that C.C.P. § 354.6 breached this rule. *Id.* at 22a. The Ninth Circuit erred by substituting this unprecedented, rigid rule in place of this Court's long-standing and nuanced foreign-affairs analysis.

a. The Ninth Circuit wrongly displaced this Court's foreign-affairs analysis to find that Section 354.6 intruded on foreign affairs

While paying lip service to this Court's well-settled foreign-affairs analysis, the Ninth Circuit affirmed the district court's dismissal of these cases via a two-step sleight of hand that substituted edict for analysis. First, it identified a war-powers component to federal foreign-affairs authority and gave it an expansive definition. Second, the Ninth Circuit refused to conduct any further analysis because, as it proclaimed, the states simply cannot address any matter that "relates to war." Section 354.6, the court continued, "relates to war" and, thus, improperly intrudes on federal war powers. In other words, the Ninth Circuit concocted an "exception that swallows the rule." Without a shred of supporting authority, it benched this Court's nuanced foreign-affairs analysis and substituted its own rigid rule. This is manifest error in need of correction by this Court.

The Ninth Circuit achieved this erroneous result in the following manner. First, the court surveyed the pertinent foreign-affairs doctrine analysis, but it then declined to rule on that basis: "Although we agree that [§] 354.6 violates the foreign affairs power, we base our

holding on a narrower consideration." Slip Op., Apdx. at 23a. The court chose an alternative grounds based on federal war powers:

> We hold that [§] 354.6 is impermissible because it intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims. [*Id.*]

According to the Ninth Circuit, this federal power to make and resolve wars emanates from – indeed, is "central to" – federal foreign-affairs powers. *Id.* at 26a. *See also id.* at 21a ("matters concerning war are part of the inner core of this [foreign relations] power").

Significantly, the Ninth Circuit also recast much of the federal ***foreign-affairs*** powers as ***war*** powers. *See id.* at 21a. The court described its view of the sweeping breadth of the federal war powers – a "power" ***not*** specified in the U.S. Constitution but, instead, derived by the court apparently from a "penumbra" of powers that are supposedly expressly and exclusively granted to the federal government. *See id.* After listing federal powers relating to war actually identified in the Constitution, the Ninth Circuit then extended its reach to ***other*** matters:

> Even those foreign affairs powers in the Constitution that do not expressly concern war and its resolution may be understood, in part, as a design to ***prevent*** war. . . . Thus the inheritance provision at issue in *Zschernig*, although superficially unrelated to war, was seen by a Court operating at the height of the Cold War as a potential provocation to foreign powers. [*Id.* (emphasis in original).]

The Ninth Circuit next assumed – without analysis or citation to precedent – that ***all*** wartime lawsuits categorically involve war powers (and, hence, foreign affairs) ***and*** that the states cannot address any sort of wartime dispute:

> Matters related to war are for the federal government alone to address. [*Id.* at 22a.]

But in making this sweeping declaration, the Ninth Circuit ignored this Court's nuanced test for evaluating whether a particular state action or statute involves foreign affairs. This applicable test, as shown above, conclusively establishes that § 354.6 does ***not*** involve foreign affairs. *See supra* at 9-21. Instead, the Ninth Circuit simply proclaimed that ***all*** "matters related to war" involve foreign affairs. It labeled § 354.6 an effort by the California legislature to "create . . . a remedy for wartime acts." Slip Op., Apdx. at 23a. Thus, or so the Ninth Circuit held, it is "related to war."

The court allowed one exception to this rigid new rule, namely, that states may act on matters relating to foreign affairs when expressly authorized by the federal government:

> In the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government's resolution of war-related disputes. [*Id.* at 26a.]

The Ninth Circuit then affirmed dismissal of Petitioners' state-law claims on the ground that states cannot exercise any foreign-affairs power – that is, according to the court below, they cannot even establish a forum to litigate claims arising from tortious acts committed during wartime – absent specific federal authorization, which the California Legislature lacked in this case. *Id.* at 27a-28a.

The fatal flaw in this reasoning is the Ninth Circuit's ***premise that § 354.6 is a proscribed exercise of foreign-affairs powers by a state***. As set forth above, § 354.6 as applied here is ***not*** an exercise of foreign-affairs powers under the established test stated by this Court in *Clark/Zschernig* and employed by the lower federal courts. Tellingly, in this case the Ninth Circuit declined to address whether § 354.6 is an improper state exercise of foreign affairs under *Clark/Zschernig*. *See* Slip Op., Apdx. at 23a; *supra* at 22. Unlike *Gerling*, where the Ninth Circuit applied the *Clark/Zschernig* test to find that a related California Holocaust victims' statute did not intrude on foreign affairs – notwithstanding the fact

that the statute in question plainly "related to war" – nowhere in the present decision did the Ninth Circuit even attempt to apply the test to Petitioners' claims for damages. Instead, the court below conjured a novel analysis, which employed none of the *Clark/Zschernig* factors nor derived from any prior authority, to conclude that § 354.6 intruded into foreign affairs. The Ninth Circuit then found that the statute did so without authorization from U.S. treaties resolving World War II-era disputes. *E.g.*, Slip Op., Apdx. at 26a ("[n]o party argues that any of these agreements provides the authority for a state of the United States to create a private right of action enabling individuals to recover for wartime injuries").

Given the Ninth Circuit's view that (i) federal war powers are so broad as to sweep up much of federal foreign-affairs powers, and (ii) "all things related to war" are beyond the reach of any state, the Ninth Circuit's decision is dangerously removed from all foreign-affairs precedent. In other words, in this case the Ninth Circuit has swept away this Court's decisions in *Clark* and *Zschernig* and their lower federal-court progeny, and replaced them with an untested edict that ***all*** "matters related to war" are foreign-affairs issues "for the federal government alone to address."

This sweeping extension of the federal foreign-affairs powers to all things "related to war" is unprecedented and contrary to precedent. Victims of wartime tortious misconduct committed in foreign lands can, in fact, assert claims arising under state law against the perpetrators. In *Linder v. Portocarrero*, 963 F.2d 332, 333 (11th Cir. 1992), for example, the surviving family members of an American citizen who was tortured and killed in Nicaragua by Nicaraguan anti-government military forces ("Contras") sued the individuals allegedly responsible, as well as three Contra organizations. Plaintiffs asserted various claims under Florida state law for wrongful death, torture and intentional infliction of emotional distress. *Id.* at 334. The Eleventh Circuit rejected defendants' contention that no liability could stem from tortious conduct occurring during war, *id.* at 336, even though the Executive Branch of the U.S. Government was actively, though covertly, supporting the

Contras in their war against the Nicaraguan government.[17] Though covert and undeclared, the U.S. Government's war-by-proxy against the Nicaraguan government would certainly fall within the Ninth Circuit's swollen concept of federal war powers, as pronounced in this case. Under the Ninth Circuit's all-things-related-to-war standard, the *Linder* claims would have been dismissed (improperly so) as an unconstitutional intrusion on federal war powers.

So too would have been the state-law claims asserted against the Palestine Liberation Organization ("PLO") in *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione*, 937 F.2d 44 (2d Cir. 1991).[18] The U.S. Government had deemed the PLO a terrorist organization under the Anti-Terrorism Act (22 U.S.C. §§ 5201-03), *see* 937 F.2d at 46, which could also fall within federal war powers, as described by the court of appeals in this case. The plaintiffs were a survivor of and the estate of Leon Klinghoffer, an American murdered onboard an Italian cruise ship, the *Achille Lauro*, allegedly by PLO associates. *Klinghoffer*, 937 F.2d at 47. As "related to war," the state-law claims would be unconstitutional under the Ninth Circuit decision. The Second Circuit would have disagreed, however, in light of its characterization of plaintiffs' claims:

> [W]e are faced with an ordinary tort suit, alleging that the defendants breached a duty of care owed to the plaintiffs or their decedents. [*Id.* at 49.[19]]

The Ninth Circuit's new rule would also have altered the foreign-affairs decisions discussed above; indeed, it conflicts with this Court's

17. As a result, the *Linder* plaintiffs sought discovery from the FBI, CIA, Defense and State Departments, the National Security Agency and the Immigration and Naturalization Service. *See Linder v. DOD*, 133 F.3d 17, 20 (D.C. Cir. 1998).

18. The district court noted that plaintiffs asserted claims under state and other law. *See Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione, etc.*, 739 F. Supp. 854, 857 (S.D.N.Y. 1990).

19. *Klinghoffer* addressed this statement to whether plaintiffs' claims were non-justiciable political questions. The court found that they were not. *Id.* at 49-50.

rulings in *Clark* and *Zschernig*. The dispute presented in *Clark*, which straddled World War II, plainly "related to war." The dispute arose from property bequeathed to German nationals just days after this nation's declaration of war against Germany. As already described (*supra* at 11), the Alien Property Custodian impounded the estate pursuant to the Trading With the Enemy Act and sought a ruling that he possessed the superior interest in the estate. To resolve the matter, this Court examined federal wartime policies, several treaties and a California probate statute. Notwithstanding the dispute's obvious relationship to "war," this Court disposed of the constitutional challenge to the probate statute via the foreign-affairs test discussed elsewhere (*see supra* at 11-12). It suggested no exception for "matters related to war."

With regard to *Zschernig*, in this case the Ninth Circuit characterized the case as motivated by this Court's concern that the California statute was a "potential provocation" for war. Slip Op., Apdx. at 21a-22a. Yet *Zschernig* applied the *Clark* foreign-affairs analysis and recognized no exception for war-related matters.

The California HVIRA statute that was at issue in *Gerling* (*see supra* at 12-13) likewise concerned Nazi Holocaust victims' claims, and would have been found to constitute an unconstitutional intrusion on federal "war" powers under the Ninth Circuit's ruling here. Even the "Buy American" state law at issue in *Trojan* (*see supra* at 12) could be deemed "related to war" as an effort to sharpen the U.S. economy and war readiness during Cold War tensions. *Cf.*, Slip Op., Apdx. at 21a-22a (characterizing the state probate statute at issue in *Zschernig* as war related). And the district court's foreign-affairs analysis in *Tayyari* (*see supra* at 15-16) would have been superfluous because the court simply could have found that New Mexico's effort to coerce the Iranian regime during the hostage crisis interfered with the U.S. Government's negotiations to avoid war.

But none of these federal courts did so. Despite their case's relationship to "war" (as the Ninth Circuit broadly construed the term), each court applied the foreign-affairs test without recognizing any all-matters-relating-to-war exception. In short, in this case the

Ninth Circuit highjacked the established and nuanced *Clark/Zschernig* foreign-affairs analysis and substituted its inflexible and unprecedented related-to-war rule. This was prejudicial error that requires this Court's attention.

b. The Ninth Circuit wrongly deemed immaterial that the U.S.'s resolution of wartime claims against Japan did not address Korean nationals' claims

Faced with the fact that Korea was not a signatory to any U.S. treaty resolving World War II issues, and that, accordingly, no U.S. treaty stood in the way of Petitioners' effort to pursue wartime forced-labor claims in California courts, the Ninth Circuit simply deemed this fact "immaterial." Slip Op., Apdx. at 28a n.14.[20] The Ninth Circuit instead concluded that no treaty expressly authorized states to provide a forum for private wartime tort claims brought by nationals of Korea, China or anywhere else. Given its rulings that such explicit authorization was required, it was of no import to the court that no treaty precluded California from hearing Petitioners' claims.

Accordingly, if this Court accepts this petition and rejects the Ninth Circuit's war-powers analysis, no treaty would bar a court from hearing Petitioners' claims.

B. The Gravity of Petitioners' Injuries And The Corporate Misconduct Compel Review of The Ninth Circuit's Decision

The severity of Petitioners' injuries and defendants' atrocious conduct alone commend this matter for review. The Ninth Circuit somberly characterized the factual background of these and the 25 other cases that were consolidated before it. According to the court below, these cases concern atrocities committed during World War II by private Japanese and, in one instance, German corporate interests. These private corporations meted out terrible abuses on

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20. The district court likewise found that no peace treaty signed by the U.S. was intended to or did resolve individual wartime claims of Korean nationals. *See In re World War II Era Japanese Forced Labor Litig.*, Apdx. at 47a-52a.

civilians of Korea, China and other countries, and also on U.S. and Allied soldiers captured by Japanese and German military forces during the Second World War. The private corporations and their managers not only forced countless individuals to work long hours without pay but they also inflicted vicious and inhuman cruelties on them. The slave workers were often underfed, physically beaten, exposed to dangerous conditions and denied medical care; many were murdered and others died as a result of the maltreatment they suffered. Slip Op., Apdx. at 4a.

These forced and slave workers, notwithstanding passage of more than 50 years, have received nothing from the corporate defendants – no back wages, no apology, and no compensation for their often horrific mistreatment. In § 354.6, the California Legislature provided them one last opportunity to wring some measure of justice from their tormentors as compensation, however meager, for the labor, health and dignity that defendants stole from them. The Ninth Circuit's decision, if allowed to stand, forecloses that opportunity, and justice – already delayed – will be forever denied.

C. This Court's Impending *Low* Decision Will Not Address The Ninth Circuit's Error in This Case

Section 354.6 is part of a California legislative initiative to pass statutes attempting to address certain injustices still lingering from the global calamity that was World War II. Another of these statutes has been challenged as unconstitutional intrusion on the federal government's exclusive foreign-affairs powers. HVIRA (*see supra* at 12-13) is currently before this Court in *American Insurance Ass'n v. Low*, 02-722 ("*Low*"), which is an appeal from the Ninth Circuit's *Gerling* decision. This Court heard oral argument in that case on April 23, 2003. The issue presented in that case is the proper test for determining whether a state action intrudes on federal foreign-affairs powers.

What is not at issue in *Low* is the Ninth Circuit's novel all-things-related-to-war rule that the court below devised in the instant case to bypass the *Clark/Zschernig* foreign-affairs analysis.

Irrespective of any refinements that *Low* will likely provide to the *Clark/Zschernig* analysis, *Low* offers no opportunity to address the Ninth Circuit's war-powers exception. Even though the Ninth Circuit stayed its mandate in this case pending the *Low* decision (Slip Op., Apdx. at 41a), *Low* likely will not alter the outcome here.

The Ninth Circuit's war-powers analysis and the decision in these cases plainly warrant review. The decision of the court below is both a novel and a sweeping alteration of existing law. Petitioners have already described its breadth (*see supra* at 23 (citing Slip Op., Apdx. at 21a) and potential for wide application elsewhere (*see supra* at 25-28). It is also novel and inflexible. Notwithstanding its breadth, apparently no court has ever previously recognized a war-powers exception to the existing foreign-affairs analysis – at least the Ninth Circuit cited none and Petitioners' own research has uncovered nothing – despite innumerable opportunities. Indeed, this Court's decision in *Clark* squarely arose from a war context, yet it analyzed the constitutional challenge to the state law strictly as a matter of foreign affairs, not as "related to war." *See supra* at 11, 27.

The rule adopted by the Ninth Circuit in this case is unprecedented, notwithstanding that issues relating to federal authority over foreign affairs – including war – have been matters of judicial concern dating back to the very founding of the Republic. As such, to the extent it displaces the established *Clark/Zschernig* foreign-affairs analysis (and as likely refined by *Low*), it is contrary to law. This sweeping, inflexible rule is capable of great mischief. This Court's review of the Ninth Circuit's decision is essential.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JANUARY 21, 2003 AND AMENDED MARCH 6, 2003 AND ORDER OF THE COURT AMENDING OPINION AND DENYING PETITIONS FOR REHEARING AND REHEARING EN BANC DATED MARCH 6, 2003

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 01-17197
D.C. No. CV-99-05303-VRW

SUK YOON KIM, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

ISHIKAWAJIMA HARIMA HEAVY INDUSTRIES LTD.; IHI INC.; SUMITOMO HEAVY INDUSTRIES LTD.; SUMITOMO HEAVY INDUSTRIES (USA) INC.,

Defendants-Appellees.

No. 01-17203
D.C. No. CV-00-03242-VRW

SA SON SIN,

Plaintiff-Appellant,

Appendix A

v.

MITSUI & CO, LTD.; MITSUI & CO. (USA);
MITSUI ENGINEERING & SHIPBUILDING CO., LTD.;
PACECO CORPORATION,

Defendants-Appellees.

No. 01-17211
D.C. No. CV-99-05309-VRW

JAE SIK CHOE,

Plaintiff-Appellant,

v.

NIPPON STEEL CORPORATION;
MITSUBISHI HEAVY INDUSTRIES, LTD.,

Defendants-Appellees.

No. 01-17251
D.C. No. CV-00-03752-VRW

DO GEUN OH; EUNG CHANG LEE; YONG HAE LEE, individually and on behalf of a class of persons similarly situated,

Plaintiffs-Appellants,

v.

Appendix A

MITSUI & CO., LTD., a Japanese business association; MITSUI & CO. (USA), a business association; MITSUBISHI CORPORATION, a Japanese business association; MITSUBISHI CORPORATION, a business association; MITSUBISHI HEAVY INDUSTRIES, LTD., a Japanese business association; MITSUBISHI HEAVY INDUSTRIES AMERICA, INC., a business association; MITSUBISHI MATERIALS CORPORATION, a Japanese business association; MITSUBISHI MATERIALS USA CORPORATION, a business association; NIPPON STEEL CORP, a Japanese business association; NIPPON STEEL USA, a business association; SHOWA DENKO AMERICA, INC., a business association; SHOWA KOGYO, a Japanese business association,

Defendants-Appellees.

Argued and Submitted Oct. 7, 2002.
Filed Jan. 21, 2003.
Amended March 6, 2003.

AMENDED OPINION

Plaintiffs-Appellants in these consolidated cases allege that they were forced to work as slave laborers for German and Japanese corporations during the Second World War. They seek damages and other remedies for lost wages and for other atrocious injuries they suffered in the course of their forced labor. Defendants-Appellees are corporations (or successors or affiliates of those corporations) that allegedly committed these atrocities.

Appendix A

A California statute passed in 1999 creates a cause of action against such defendants for claims involving Second World War slave labor.[1] Cal. Code Civ. Proc. § 354.6. Under the statute, these claims are not time-barred if commenced on or before December 31, 2010. *Id.* Although Appellants assert a variety of statutory and common law claims for relief, all raise section 354.6 as the primary basis for bringing their suits so many years after the alleged wrongs were committed. Reluctantly, we hold that section 354.6 is invalid under the United States Constitution and that in its absence Appellants' remaining claims are time-barred.

Background

These cases concern the terrible abuses that German and Japanese corporate interests inflicted both on civilians and on soldiers captured by German and Japanese military forces during the Second World War. The corporations and their managers, with the cooperation and encouragement of their governments, subjected many individuals to vicious cruelties and forced them to work long hours without pay. The slave workers were often underfed, physically beaten, exposed to dangerous conditions, and denied medical care; many were murdered, and others died as a result of the maltreatment they suffered. Among these slave laborers were, tragically, many who became victims of the Holocaust, the most atrocious act ever perpetrated by a civilized (or uncivilized)

1. Although the statute distinguishes between "slave laborers," *see* Cal. Code Civ. Proc. § 354.6(a)(1), and "forced laborers," *see* § 354.6(a)(2), the distinction is generally immaterial to the analysis in this opinion. We generally use the term "slave laborer" to refer to both categories of workers.

people, an act unparalleled in history. Indeed, the Holocaust represents the worst historic manifestation of the perpetual human condition known as antisemitism, a phenomenon that is still thriving in all too many parts of the world today.[2]

I. The Cases

A. *Deutsch v. Turner*

The suit by Appellant Josef Tibor Deutsch ("Deutsch") is the only action before us concerning wrongs committed by German rather than Japanese corporations and the only action that was not consolidated with other cases by the district court. It is, in other words, the only Holocaust case at issue here, and it, unlike most of the Japanese cases, involves only a single plaintiff.

Currently a resident of California, Deutsch, a Jew, was born and raised in Hungary. Deutsch asserts that, in 1944, when he was a child, the Nazis took over his town and

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2. It is plainly Holocaust survivors who are the intended beneficiaries of section 354.6, which speaks of "concentration camp[s]" and "ghettos[s]," mentions no power by name other than the "Nazi regime," and never employs the term "Axis Powers," which is the usual collective term for the enemies of the Allied Powers. Ironically, among the hundreds of thousands of plaintiffs in the cases before us, there is only one Holocaust survivor. All the other plaintiffs suffered their injuries in Asia at the hands of Japanese companies. Whatever the intended purpose of the California statute, the text of section 354.6 appears to be broad enough to encompass all the plaintiffs' claims, and not just those of the one Holocaust survivor. We follow the district court and all the parties before us in assuming that such is the case.

transported him and his brother Georg to Auschwitz. There the brothers were tortured and forced to work as slaves for 14-hour days, seven days a week. Their work was for the benefit of private corporations, which entered into agreements with the Nazi government, whereby they paid the Nazis less than the prevailing wage for the work of the slaves. The corporations for which the Deutsch children labored included Appellee Hochtief AG ("Hochtief"), one of Germany's largest and oldest construction companies. A civilian employee of Hochtief overseeing the slave laborers in their work for Hochtief beat Deutsch's brother Georg. Georg ultimately died from his injuries. By a stroke of good fortune, Deutsch, unlike most of his co-religionists, survived.

On April 7, 2000, Deutsch filed a complaint in the Superior Court of California against Hochtief, its wholly owned subsidiary the Turner Corporation, a Delaware corporation, and the Kitchell Corporation, an Arizona corporation that Hochtief owns in part. Deutsch alleged intentional infliction of emotional distress, unlawful business practices under the California Business and Professions Code, quantum meruit, and wrongful death. The action was removed to federal court on the ground of diversity jurisdiction.

Deutsch's basis for bringing the action so long after the alleged acts is section 354.6 of the California Code of Civil Procedure, which confers jurisdiction on the Superior Court to hear claims by "[a]ny Second World War slave labor victim" or "Second World War forced labor victim," or their heirs, against "any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate." Cal. Code Civ. Proc. § 354.6(b).

Section 354.6 permits such actions to be brought on or before December 31, 2010, regardless of any otherwise applicable statute of limitations. § 354.6(c).

The district court dismissed the action as presenting a nonjusticiable political question. *Deutsch v. Turner*, 2000 WL 33957691 (C.D.Cal.2000).

B. *In re World War II Era Japanese Forced Labor Litigation*

The consolidated appeal before us also involves 28 other suits, all by victims and heirs of victims against Japanese business entities. Some were brought as class actions. Because there are so many complaints, and because the precise factual allegations do not bear on our decision, we do not here recount the details of the injuries that the various Appellants endured. Unlike Deutsch, these individuals—some civilians, some soldiers who were prisoners of war —were not selected because of their religious affiliation and were not victims of an overall plan to exterminate an ethnic or religious group. Rather, they became subject to the Japanese slave labor program either because they opposed the Japanese war efforts, in one capacity or another, or simply because they were in the wrong place at the wrong time. In any event, they were all subjected to serious mistreatment, including starvation, beatings, physical and mental torture, being transported in unventilated cargo holds of ships, and being forced to make long marches under a tropical sun without water. Some survived, while others were ultimately executed, or died from disease or physical abuse.

Appendix A

Twenty-seven of the suits against the Japanese corporate interests were originally brought in California Superior Court, while one was initiated in the United States District Court for the Central District of California. The claimants demanded damages and other relief, raising claims under California Code of Civil Procedure section 354.6, and alleging, variously, assault and battery, unjust enrichment, conspiracy, false imprisonment, intentional infliction of emotional distress, conversion, quantum meruit, unfair business practices under California Business and Professions Code sections 17200 *et seq.*, involuntary servitude under California Penal Code section 181 and Article I, § 6 of the California Constitution, and violations of international law under the Alien Tort Claims Act, 28 U.S.C. § 1350. As defendants they name both Japanese corporations that they allege committed the injuries and successors and affiliates of those corporations. The suits filed in state court were removed to federal court; all were then consolidated in the Northern District of California. The district court denied motions to remand and dismissed all claims.

Appellants in the majority of the Japanese cases were, at the time of the occurrences that form the basis for these lawsuits, nationals of the United States or of other Allied nations. Many were in military service and were taken as prisoners of war. The district judge dismissed these cases on the ground that they were barred by a provision of the Treaty of Peace ending the war between the Allied Powers and Japan.[3] *In re World War II Era Japanese Forced Labor Litig.*,

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3. The provision that had this effect is Article 14(b), which provides as follows:

(Cont'd)

114 F.Supp.2d 939, 944-49 (N.D.Cal.2000) (*Forced Labor* (*Allied I*)); *In re World War II Era Japanese Forced Labor Litig.*, No. MDL-1347 (N.D.Cal. Feb. 8, 2001) (*Forced Labor* (*Allied II*)); *In re World War II Era Japanese Forced Labor Litig.*, 164 F.Supp.2d 1153, 1157 (N.D.Cal.2001) (*Forced Labor* (*Filipinos*)).

Appellants in the remaining cases were Korean and Chinese nationals. The district court held that their claims were not affected by the Treaty of Peace between the Allies and Japan, because these claimants were not Allied nationals or nationals of any signatory of that treaty. *In re World War II Era Japanese Forced Labor Litig.*, 164 F.Supp.2d 1160, 1165-68 (N.D.Cal.2001) (*Forced Labor* (*Koreans*)). The court dismissed these cases nonetheless, on the grounds that section 354.6 was an unconstitutional intrusion on the foreign

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(Cont'd)

> Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

Treaty of Peace with Japan, Sept. 8, 1951, art. 14(b), 3 U.S.T. 3169, T.I.A.S. No. 2490. The district court held that claims by Allied nationals against Japanese corpo-rations were barred under the clause waiving "other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." *Forced Labor* (*Allied I*), 114 F.Supp.2d at 944-49 (N.D.Cal.2000).

affairs powers of the United States, and that the remaining claims were time-barred. *Id.* at 1168-78.

II. Constitutionality of Section 354.6 Under Foreign Affairs Doctrine

A. Section 354.6 and Its Effect

All Appellants rely on section 354.6 of the California Code of Civil Procedure. Because it can best be understood when read as a whole, we quote it in full:

> § 354.6.
>
> (a) As used in this section:
>
> (1) "Second World War slave labor victim" means any person taken from a concentration camp or ghetto or diverted from transportation to a concentration camp or from a ghetto to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.
>
> (2) "Second World War forced labor victim" means any person who was a member of the civilian population conquered by the Nazi regime, its allies or sympathizers, or prisoner-of-war of the Nazi regime, its allies

or sympathizers, forced to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.

(3) "Compensation" means the present value of wages and benefits that individuals should have been paid and damages for injuries sustained in connection with the labor performed. Present value shall be calculated on the basis of the market value of the services at the time they were performed, plus interest from the time the services were performed, compounded annually to date of full payment without diminution for wartime or postwar currency devaluation.

(b) Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate. That action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution.

> (c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.

Appellants and the State of California as amicus seek to characterize section 354.6 as a purely procedural measure by reducing its scope to the provision regarding the limitations, as set forth in subsection (c). The entire effect of section 354.6, they argue, is to extend the statute of limitations for claims that are already available to remedy Nazi-era slave labor. They cite an impressive range of possible sources of substantive law prohibiting slave labor, including state statutes and common law, the United States Constitution, and international law. The reference in subsection (c) to "the applicable statute of limitations" supports their interpretation: If a statute of limitations is already "applicable," perhaps it is because subsection (c) contemplates a pre-existing cause of action, rather than a cause of action created under section 354.6.

However, section 354.6 can be viewed as purely procedural only when subsection (c) is viewed in isolation from the rest of the provision. Most important, the first sentence of subsection (b) explicitly creates a cause of action by providing that certain individuals "may bring an action" for certain wrongs. *See Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 122 S.Ct. 1753, 1759, 152 L.Ed.2d 871 (2002) (noting that language in a statute providing that party "may bring an action" "reads like the conferral of a private right of action"). Appellants' recitation of pre-existing causes of action for slave labor, whether under other statutes

or other bodies of law, is therefore fruitless. Regardless of any pre-existing law, the California legislature chose to create a specific cause of action for persons subjected to slave labor by the Nazis and their allies and sympathizers. If confirmation of this reading is required, it is found in those passages of section 354.6 that set forth the details of the new cause of action. The section defines the class of plaintiffs who may sue under that cause of action, *see* § 354.6(a)(1), (2), sets the method for measuring damages, *see* § 354.6(a)(3), and establishes a special rule regarding liability of corporations affiliated with the wrong-doer, *see* § 354.6(b). Even the language of the statute of limitations provision itself limits the application of the statute of limitations to "action[s] brought under this section," thus confirming that section 354.6 creates a cause of action.

Appellants' only remaining argument for the procedural nature of section 354.6 is its placement within the Code of Civil Procedure, in Title Two: Time of Commencing Civil Actions. However, where the meaning of a statutory provision is clear, we do not rely upon the location the legislature chose for it in its system of codification, *see Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1328 (7th Cir.1997), just as we do not rely upon the headings and titles of sections in such circumstances. *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528-29, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947). The reason for the placement of section 354.6 within the procedural code is, in any event, not difficult to explain: The most striking aspect of the section is, indeed, its statute of limitations, which would allow the commencement of a suit more than 60 years

after the occurrence of the injury. *Id.* Section 354.6's placement, therefore, does not change our view that the section is substantive in nature.

The parties debate whether section 354.6 is substantive or procedural primarily in the context of the Appellees' due process challenge, which we do not address. The substantive nature of the provision, however, is relevant also to the foreign affairs doctrine analysis in which we engage below, because a state is generally more likely to exceed the limits of its power when it seeks to alter or create rights and obligations than when it seeks merely to further enforcement of already existing rights and duties. Nevertheless, that distinction does not affect the outcome here. Our determination of the foreign affairs doctrine issue does not depend on our conclusion that section 354.6 is substantive law. Whether substantive or procedural, section 354.6 creates a special rule that applies only to a newly defined class of tort actions—actions brought by Second World War slave labor victims against the entities that enslaved them. This new rule profoundly alters the likelihood that such actions will succeed, by not only extending the statute of limitations for claims that were timely when the statute took effect (although we doubt that any such claims existed), but, far more important, by reviving claims that were already time-barred. In the latter instance, the statute upset the repose of potential defendants. Such a revival of liability—even civil liability—is troubling and raises serious due process questions. We need not address those questions here, however. The important point for our foreign affairs analysis is that the California legislature created—or at least

resurrected—a special class of tort actions, with the aim of rectifying wartime wrongs committed by our enemies or by parties operating under our enemies' protection.[4]

B. Foreign Affairs Doctrine Analysis

Appellees argue that section 354.6 exceeds California's power to engage in foreign affairs. We agree.[5]

The Constitution does not create an express, general power over foreign affairs but rather allocates particular powers related to foreign affairs to particular federal actors. It appoints the President as "Commander in Chief of the Army and Navy of the United States," U.S. Const., art. II, § 2, cl. 1, and authorizes him to "make Treaties, provided two thirds of the Senators present concur," to "appoint Ambassadors" with the "Advice and Consent of the Senate," *id.* cl. 2, and

4. Two decisions of the California Court of Appeal, one by the Second Appellate District and one by the Fourth, have recently addressed whether section 354.6 is substantive or procedural in nature. The decisions reached opposite conclusions. *Compare Mitsubishi Materials Corp. v. Superior Court*, 130 Cal.Rptr.2d 734, 2003 WL 253877, slip op. at 2 (Cal.Ct.App.2003) ("The legislation actually *creates* a state law claim which otherwise would not exist . . . .") *with Taiheiyo Cement Corp. v. Superior Court*, 129 Cal.Rptr.2d 451, 2003 WL 124284, slip op. at 24 (Cal.Ct.App. 2003) ("The sole purpose of section 354.6 is to extend the statute of limitations for common law claims for unpaid labor and personal injuries arising out of slave or forced labor."). Both decisions were issued after our opinion was sent to the Clerk for filing.

5. Some Appellants assert that federal jurisdiction is lacking over their claims. We address that issue below.

to "receive Ambassadors and other public Ministers," *id.* § 3. It grants to Congress the power to "lay and collect . . . Duties, Imposts, and Excises," to "provide for the common Defence," *id.* art. I, § 8, cl. 1, to "regulate Commerce with foreign Nations," *id.* art. I, § 8, cl. 3, to "establish an uniform Rule of Naturalization," *id.* cl. 4, to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," *id.* cl. 10, to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," *id.* cl. 11, to "raise and support Armies," *id.* cl. 12, to "provide and maintain a Navy," *id.* cl. 13, and to regulate "the land and naval forces," *id.* cl. 14.

While the Constitution allocates these foreign affairs powers specifically to the federal government, it also expressly prohibits the states from exercising certain foreign relations powers, including both some of those expressly allocated to the federal government and a few others. "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal" or, without consent of Congress, "lay any Imposts or Duties on Imports or Exports," "keep Troops or Ships of War in time of Peace," "enter into any Agreement or Compact . . . with a foreign Power," or "engage in War, unless actually invaded." *Id.* § 10.

Because the Constitution mentions no general foreign affairs power, and because only a few specified powers related to foreign affairs are expressly denied the states, one might assume that, with certain exceptions, states are free to pursue their own foreign policies. This is not, however, the case. To the contrary, the Supreme Court has long viewed the

foreign affairs powers specified in the text of the Constitution as reflections of a generally applicable constitutional principle that power over foreign affairs is reserved to the federal government. The Court has sometimes expressed this principle in expansive terms, declaring, for example, that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233, 62 S.Ct. 552, 86 L.Ed. 796 (1942); *see also Chae Chan Ping v. United States*, 130 U.S. 581, 606, 9 S.Ct. 623, 32 L.Ed. 1068 (1889) (*The Chinese Exclusion Case*) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.").

The implication of the general principle is that "even in [the] absence of a treaty" or federal statute, a state may violate the constitution by "establish [ing] its own foreign policy." *Zschernig v. Miller*, 389 U.S. 429, 441, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968).[6] *Zschernig* concerned an Oregon statute that provided for escheat of estate property claimed by a nonresident alien unless United States citizens had reciprocal rights in the country of the alien's residence and foreign heirs in that country would have the right to receive the proceeds of Oregon estates without confiscation. *Id.* at 430-31, 88 S.Ct.

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6. The doctrine has been referred to as "dormant foreign affairs preemption," or simply as "the foreign affairs power." *See Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 751 n. 9 (9th Cir.2001) (internal quotation marks removed), *cert. granted sub nom. Am. Ins. Ass'n v. Low*, 71 U.S.L.W. 3373 (2003).

664. The Court held that, while a reciprocity statute of this sort was not facially invalid, probate courts applying it impermissibly relied on inquiries into the type of governments that obtain in particular foreign nations—whether aliens under their law have enforceable rights, whether the so-called "rights" are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation. *Id.* at 434, 88 S.Ct. 664. In short, the Court found that the application of the statute depended less on an evaluation of the stated law of a particular country than on whether that country's political system was legitimate in the view of the Oregon courts. *See id.* at 440, 88 S.Ct. 664 (noting that state courts had held that communist and fascist countries did not grant rights reciprocal to those of Oregonians). To condition the application of state law on the political system of a foreign country was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Id.* at 432, 88 S.Ct. 664.

Despite the broad language of *Pink* and the *Chinese Exclusion Case*, however, *Zschernig* is "[t]he only case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power." *Int'l Ass'n of Indep. Tanker Owners v. Locke*, 148 F.3d 1053, 1069 (9th Cir.1998), *rev'd in part on other grounds sub nom. United States v. Locke*, 529 U.S. 89, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000). *Zschernig* has been applied sparingly, because the Supreme Court has held that a statute does not violate the constitution

where it merely has "some incidental or indirect effect in foreign countries." *Clark v. Allen*, 331 U.S. 503, 517, 67 S.Ct. 1431, 91 L.Ed. 1633 (1947) (upholding facially a statute similar to that subsequently struck as applied in *Zschernig*).[7]

Noting that "the federal government's foreign affairs power . . . . is rarely invoked by the courts," we have declined to invalidate under *Zschernig* a California statute with certain superficial similarities to section 354.6. *Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 752 (9th Cir.2001), *cert. granted sub nom. Am. Ins. Ass'n v. Low*, 71 U.S.L.W. 3373 (2003). *Gerling* concerned California's Holocaust Victim Insurance Relief Act, Cal. Ins. Code §§ 13800-13807 ("HVIRA"), which requires insurers doing business in California to file certain information about any insurance policies that they or companies "related" to them sold in Europe and that were in effect between 1920 a nd 1945. *Id.*; *see Gerling*, 240 F.3d at 743, 753. While recognizing that HVIRA involved foreign affairs, we held that it was constitutional because of the combination of two factors: first, "HVIRA, on its face, involves commerce

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7. Other courts have, however, invalidated statutes under foreign affairs doctrine. *See, e.g., Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 49-61 (1st Cir.1999) (invalidating Massachusetts law restricting ability of Massachusetts and its agencies to purchase goods or services from individuals or companies engaged in business with Burma), *aff'd on other grounds sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000); *Springfield Rare Coin Galleries, Inc. v. Johnson*, 115 Ill.2d 221, 236-37, 104 Ill.Dec. 743, 503 N.E.2d 300 (1986) (invalidating state statute excluding South African coins from otherwise generally applicable state tax exemptions).

alone"—and thus should be considered under the Supreme Court's foreign commerce cases rather than under the foreign affairs cases; and second, HVIRA "is not, on its face, directed at any particular foreign country"—and thus is comparatively unlikely to interfere with the foreign relations of the federal government. *Id.* at 753.

While *Gerling* shows that the general prohibition against state involvement with external affairs is not as broad as some judicial statements would imply, it also suggests a mode of analysis that is relevant to the cases before us. In particular, *Gerling* distinguishes among statutes according to the foreign affairs functions that they implicate. *Gerling* suggests that statutes that "mainly involve foreign commerce" are among those least likely to be held invalid under the foreign affairs power. *Id.* The regulation of commerce is simply not central to the foreign affairs power that is off limits to states.[8] For present purposes, we must consider the importance to foreign affairs analysis of another subset of foreign affairs powers: the power of the federal government to make and to resolve war, including the power to establish the procedure for resolving war claims.

While neither the Constitution nor the courts have defined the precise scope of the foreign relations power that

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8. State regulation of foreign commerce might, however, exceed constitutional limitations under other constitutional doctrines. *See, e.g., Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 328, 114 S.Ct. 2268, 129 L.Ed.2d 244 (1994) (considering whether state's international tax reporting system violated either dormant commerce clause or federal government's ability to speak in "one voice.")

is denied to the states, it is clear that matters concerning war are part of the inner core of this power. Of the eleven clauses of the Constitution granting foreign affairs powers to the President and Congress, *see supra*, seven concern preparing for war, declaring war, waging war, or settling war.[9] Most of the Constitution's express limitations on states' foreign affairs powers also concern war.[10] Even those foreign affairs powers in the Constitution that do not expressly concern war and its resolution may be understood, in part, as a design to *prevent* war. Indeed, as the *Federalist* shows, supporters of the new Constitution believed that disunity in international affairs risked unnecessary war. *See, e.g.*, THE FEDERALIST, NO. 3, at 13 (Clinton Rossiter ed., 1961) ("[F]ewer just causes of war will be given by the national government, [and] it will also be more in their power to accommodate and settle them amicably."). The Supreme Court cases under the foreign affairs power have also been driven, in part, by this concern. Thus the inheritance provision at issue in *Zschernig*, although superficially unrelated to war, was seen by a Court operating at the height of the Cold War as a potential provocation to

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9. *See* U.S. Const., art. II, § 2, cl. 1 (making President Commander in Chief); *id.* cl. 2; (authorizing President to make treaties with advice and consent of Senate); *id.* art. I, § 8, cl. 1 (authorizing Congress to "provide for the common Defence"); *id.* cl. 11 (authorizing Congress to declare war); *id.* cl. 12 (authorizing Congress to raise and support armies); *id.* cl. 13 (authorizing Congress to "provide and maintain a Navy"); *id.* cl. 14 (authorizing Congress to regulate "the land and naval forces").

10. *See id.* § 10 (prohibiting states from entering "any Treaty, Alliance, or Confederation," or, without congressional authorization, from "keep[ing] Troops or Ships of War in time of Peace" and from "engag[ing] in War, unless actually invaded.")

foreign powers. " 'Experience has shown,' " the Court wrote in striking the provision, " 'that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.' " 389 U.S. at 441, 88 S.Ct. 664 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 64, 61 S.Ct. 399, 85 L.Ed. 581 (1941)). Matters related to war are for the federal government alone to address.

Among the six district court decisions we review here, the only one to reach the foreign affairs challenge to section 354.6 held that the provision was unconstitutional under that doctrine for six reasons:

> (1) the terms of section 354.6 and its legislative history demonstrate a purpose to influence foreign affairs directly, (2) the statute targets particular countries, (3) the statute does not regulate an area that Congress has expressly delegated to states to regulate, (4) the statute establishes a judicial forum for negative commentary about the Japanese government and Japanese companies, (5) the Japanese government asserts that litigation of these claims could complicate and impede diplomatic relationships of the countries involved, and (6) the United States, through the State Department, contends that section 354.6 impermissibly intrudes upon the foreign affairs power of the federal government.

Forced Labor (*Koreans*), 164 F.Supp.2d at 1173. Although we agree that section 354.6 violates the foreign affairs power, we base our holding on a narrower consideration. We hold that section 354.6 is impermissible because it intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims.

With section 354.6, California seeks to redress wrongs committed in the course of the Second World War. By its terms, only "Second World War slave labor victims" and "Second World War forced labor victims" can bring suit under the provision. § 354.6(b). The wrong-doers under the statute—the enslaving individuals or entities—include "the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies or sympathizers." § 354.6(a)(1), (2). The governmental entities are, by definition, wartime enemies of the United States, while the "enterprises" identified in the provision, if not themselves our wartime enemies, were operating in enemy territory and presumably—no party disputes this—with the consent and for the benefit of our wartime enemy. Wrongs committed after the end of the war are not cognizable under section 354.6; the provision concerns only acts that took place during the years leading up to the war and during the years of the war itself. *Id.* In short, California has sought to create its own resolution to a major issue arising out of the war—a remedy for wartime acts that California's legislature believed had never been fairly resolved.

Appendix A

The United States has already exercised its own exclusive authority to resolve the war, including claims arising out of it. It did not choose, however, to incorporate into that resolution a private right of action against our wartime enemies or their nationals. The United States resolved the war against Germany by becoming a party to a number of treaties and international agreements, beginning with the 1945 agreements at Yalta and Potsdam, in which the United States, Britain, and the Soviet Union agreed to extract reparations from Germany and its nationals but did not include a private right of action against either. *See* Protocol of the Proceedings, Berlin (Potsdam) Conference, Aug. 2, 1945, art. (B)(111), 3 Bevans 1207. Subsequent agreements also failed to create a private right of action, including the Paris Reparations Treaty of 1946 between the United States and 17 other nations, Agreement on Reparations From Germany, Jan. 14, 1946, 61 Stat. 3157, T.I.A.S. 1655 ("Paris Reparations Treaty"); the Transition Agreement of 1952 between the Western Powers and the Federal Republic of Germany, Convention Between the United Kingdom of Great Britain and Northern Ireland, France, the United States of America and the Federal Republic of Germany on the Settlement of Matters Arising Out of the War and the Occupation, May 26, 1952 (as amended by Schedule IV to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954), 6 U.S.T. 4117, 331 U.N.T.S. 219; the London Debt Agreement of 1953 between the United States and 20 other nations, Agreement on German External Debts, Feb. 27, 1953, 4 U.S.T. 443, 333 U.N.T.S. 3; and the Two-Plus-Four Treaty, which reunified Germany and became effective on March 15, 1991, Treaty on the Final Settlement with Respect to Germany, Sept. 12,

1990, 29 I.L.M. 1186.[11] Most recently, the Foundation Agreement of July 17, 2000, an executive agreement between the governments of Germany and the United States, provided a limited form of remedy for claimants such as Deutsch. Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning the Foundation "Remembrance, Responsibility and the Future." The Foundation was created by Germany, in negotiation with the United States, five

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11. For useful and accessible surveys of these agreements as they apply to war reparations, see *Iwanowa v. Ford Motor Co.*, 67 F.Supp.2d 424, 448-56 (D.N.J.1999), and *Burger-Fischer v. DeGussa AG*, 65 F.Supp.2d 248, 265-73 (D.N.J.1999). The district court in *Deutsch* relied heavily on these cases and adopted their conclusion that Deutsch's claim raised a nonjusticiable political question, *Deutsch*, 2000 WL 33957691, at 2-6, a conclusion with which we disagree. The district court determined that the postwar agreements created the exclusive remedy to the matters raised by Deutsch, and that to order relief would therefore require the court to interfere with the foreign affairs choices of the political branches. *Id.* Under political question doctrine, the court noted, it is impermissible for a court to make policy related to foreign affairs. *Id.* at 2 (citing *Baker v. Carr*, 369 U.S. 186, 211, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). Therefore, the district court supposed, *Deutsch* raised a nonjusticiable political question. The problem with this argument is that it makes every dispute over the proper application of a treaty into a political question, because treaties inherently involve foreign affairs. No political question, however, is raised by the simple application of the requirements of a treaty to which the United States is a party. Treaties have the force of law, *see Missouri v. Holland*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920), and, if they are self-executing or have been implemented through legislation, must be applied by the courts. *See United States v. Alvarez-Machain*, 504 U.S. 655, 667, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992).

Central and Eastern European countries, Israel, and the non-governmental Conference on Jewish Material Claims Against Germany, for the purpose of making payments to people who suffered at the hands of German companies during the Nazi Era. It provides for payment of up to 15,000 German Marks (roughly $7500) to individual claimants who were subjected to forced labor. *See id.* at Annex A. We do not have the authority to consider the adequacy of such payments here. Indeed, we acknowledge that no possible compensation could be sufficient to remedy the harm done to Holocaust victims and their families.

No party argues that any of these agreements provides the authority for a state of the United States to create a private right of action enabling individuals to recover for wartime injuries against German corporations. Deutsch argues, however, that the terms of these various agreements do not *prohibit* a state from creating such a right of action, and that in the absence of such a prohibition, his action may proceed. Deutsch's argument cannot carry the day. As we explained earlier, the Constitution allocates the power over foreign affairs to the federal government exclusively, and the power to make and resolve war, including the authority to resolve war claims, is central to the foreign affairs power in the constitutional design. In the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government's resolution of war-related disputes.

Appendix A

The war with Japan ended with the Treaty of Peace, signed in San Francisco, on September 8, 1951, by the representatives of the United States and 47 other Allied powers and Japan, and ratified by the United States Senate on April 28, 1952. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, T.I.A.S. No. 2490. Although the parties dispute whether that treaty by its own terms precludes the claims brought by any of the Appellants,[12] that is the only dispute regarding the treaty. No party asserts that the treaty either creates—explicitly or implicitly—a private right of action against Japan or its nationals, or authorizes states of the United States to create such a right.[13] Once again, without

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12. The central disagreement concerns the meaning of Article 14(b) of the treaty, which is quoted in full *supra* note 3. The district judge held that Appellants' claims were waived because they are claims of Allied nationals "arising out of actions taken by [Japanese] nationals in the course of the prosecution of the war." *Id.*; *Forced Labor* (*Allied I*), 114 F.Supp.2d at 944-49. Appellants argue that the actions of the Appellee corporations were not taken "in the course of the prosecution of the war," or that it is an issue of fact whether they were or not.

13. Appellants do assert that, if Article 14 of the treaty waives claims against Japanese nationals, as Appellees assert, then Article 14 is superceded by Article 26. Article 26 provides, in pertinent part:

> Should Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, the same advantages shall be extended to the parties to the present Treaty.

(Cont'd)

such authorization, states lack the power to alter the federal government's resolution of disputes relating to the war.[14]

The grievances of at least one class of potential plaintiffs identified in section 354.6, prisoners of war, were addressed by the federal government in domestic legislation. *See* § 354.6(a)(2). Under the War Claims Act of 1948, 50 U.S.C. app. §§ 2001-2017p, assets seized from Germany, Japan, or their nationals within the United States and its territory

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Treaty of Peace with Japan, at art. 26. Appellants argue that other foreign states have entered into agreements with Japan that do not waive private claims and that those agreements thereby extend to those foreign states "greater advantages" than the terms extended to the United States. The district court found that Article 26 confers rights only on the "parties" to the treaties, not on individuals. *Forced Labor* (*Allied I*), 114 F.Supp.2d at 949. We agree, at least as to the right to invoke the clause. It is the prerogative of the United States, not of California or of Appellants, to determine whether a foreign state has been granted greater advantages and, if so, whether it is in the interest of the United States to incorporate those advantages (along with any concomitant lesser disadvantages) into the treaty. The United States has not invoked Article 26 to authorize a private right of action. Appellants' reliance on the article is, therefore, unavailing.

14. It is immaterial that many of the Appellants are nationals of two nations, China and Korea, that were not signatories of the San Francisco treaty. When the United States has been a party to a war, the resolution it establishes to that war is the resolution for the whole of the United States. States lack the power to modify that resolution, regardless of the citizenship of those seeking redress.

were used to compensate American prisoners of war whose rights had been violated. *See* U.S. Foreign Claims Settlement Commission, Settlement of Claims by the Foreign Claims Settlement Commission from September 14, 1949 TO MARCH 31, 1955, at 10-11 (1955); 50 U.S.C. app. § 2005(d)(2)(A). The Act required prisoners of war to submit their claims to a federal agency, whose decision was final; it conceived of no private right of action against German or Japanese entities. *See* 50 U.S.C. app. § 2010.

California was dissatisfied with how the federal government chose to address the various wartime injuries suffered by victims of the Nazis and their allies after the United States brought the Second World War to a close. The California legislature found that, under the treaties and compensatory programs that the federal government had established, "victims of Nazi persecution have been deprived of their entitlement to compensation for their labor and for injuries sustained while performing that labor as forced or slave laborers prior to and during the Second World War." 1999 Cal. Stat. 216, § 1(b) (codified in notes to Cal. Code Civ. Proc. § 354.6). The state legislature therefore enacted section 354.6 to remedy these 54-year-old injuries in a manner favored by California but not provided for by the federal government. Appellants assert that no international agreement or other federal action prohibits California from doing so. However, as we have stated, because the issue is the lack of state power, it is immaterial whether the federal government enacted a prohibition. The federal government, acting under its foreign affairs authority, provided its own

resolution to the war; California has no power to modify that resolution.[15]

Before concluding our discussion of this issue, we must consider Appellants' most vigorous argument in favor of the

15. One might argue that the Holocaust was distinct from the German war effort, that claims for injuries arising from the Holocaust do not, therefore, relate to the war, and that such injuries, because they are unrelated to the war, do not implicate the war powers of the federal government. We need not assume that the acts of enslavement encompassed by section 354.6 served military purposes or advanced the war effort of the Nazis or their allies. We simply note that, by its terms, section 354.6 creates a right of action only for "Second World War" slave labor victims. For the purposes of the provision, the California legislature explicitly defined the harms suffered by such victims as pertaining to the war. Moreover, the federal government's exclusive power to resolve the war necessarily includes an exclusive power to address the injuries that section 354.6 attempts to remedy. The treaties themselves confirm that the federal government regarded all wartime injuries as matters integral to peacemaking, regardless of the purpose or effect of the wrong-doer's acts. In the Paris Reparations Treaty, for example, the United States and the other signatories "agree[d] among themselves that their shares of reparation, as determined by the present Agreement, shall be regarded by each of them as covering all its claims and those of its nationals against the former German Government and its Agencies, of a governmental or private nature arising out of the war." Paris Reparations Treaty, Jan. 14, 1946, art. 2(A), 61 Stat. 3157, 3163; *see also*, *e.g.*, Treaty of Peace with Hungary, Feb. 10, 1947, art. 30(4), 61 Stat. 2109, 2126 (bilateral treaty between Allied Powers and Hungary) ("Hungary waives on its own behalf and on behalf of Hungarian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939.").

constitutionality of section 354.6: that the provision "presents striking parallels" to HVIRA, the insurance reporting requirement that we upheld in *Gerling*. Appellants correctly note two points of similarity: first, like section 354.6, HVIRA is related to Nazi-era wrongs; second, as under section 354.6, at least as applied to the cases before us, the parties regulated by HVIRA are businesses. The similarity ends there, however. Unlike section 354.6, HVIRA does not attempt to require the affected businesses to compensate victims for past wrongs: Specifically, as we noted in *Gerling*, HVIRA does not impose obligations on "European insurance companies to pay or not to pay claims on European policies." *Gerling*, 240 F.3d at 745 (internal quotation marks removed). HVIRA, rather, is merely a reporting requirement and the only consequence of noncompliance is the inability to do business in California in the future. *Id.* Whereas section 354.6 seeks to provide a monetary remedy for decades-old wartime wrongs, HVIRA is a forward-looking regulatory statute.[16] In short, unlike section 354.6, HVIRA does not attempt to hold defendants liable for their past wartime conduct; it therefore does not implicate the exclusive power of the federal government to make and resolve war, including the resolution of claims arising out of such actions.

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16. Appellants in *Gerling* originally challenged two other statutes that did attempt to force payment of Nazi-era insurance claims, *see* Cal. Code Civ. Proc. § 354.5; Cal. Ins.Code § 790.15, but those claims were dismissed for lack of standing and not addressed on appeal. *Gerling*, 240 F.3d at 745; *see also Gerling Global Reinsurance Corp. of Am. v. Low*, 296 F.3d 832, 842 & n. 7 (9th Cir.2002), *cert. granted sub nom. Am. Ins. Ass'n v. Low*, 71 U.S.L.W. 3373 (2003).

Section 354.6 runs afoul of the restriction on the exercise of foreign affairs powers by the states. Because California lacks the power to create a right of action—or, alternatively, to resurrect time-barred claims—in order to provide its own remedy for war-related injuries inflicted by our former enemies and those who operated in their territories, we hold that section 354.6 is unconstitutional.

III. Statutes of Limitations

In addition to section 354.6, Appellants bring various tort claims under common law, California statutory and constitutional law, as well as for violations of international law under the Alien Tort Claims Act, 28 U.S.C. § 1350 ("ATCA"). *See supra.* All these claims are barred by their respective statutes of limitations.

Appellants apparently bring their common law claims under California law, although in many instances they do not identify the jurisdiction under whose law they seek relief. Some of the parties, including both defendants and plaintiffs, are California residents, while others are not; the alleged injuries all took place outside of California. Regardless of the source of the substantive law, because all the claims, including both common law and statutory, were brought in California state court or in a district court within California, we apply to them the statute of limitations that would be applied in California state court.[17] California applies the "governmental interest" approach to conflict of law issues.

17. The district court addressing the claims brought by Korean and Chinese Appellants found that the non-federal claims would be time-barred under Chinese and Japanese law, as well as under the law of California. *Forced Labor* (*Koreans*), 164 F.Supp.2d at 1182.

Hurtado v. Superior Court, 11 Cal.3d 574, 579-80, 114 Cal.Rptr. 106, 522 P.2d 666 (1974). Under this approach, the correct choice of law depends on "an analysis of the respective interests of the states involved." *Id.* at 579, 114 Cal.Rptr. 106, 522 P.2d 666. Where the conflict concerns a statute of limitations, the governmental interest approach generally leads California courts to apply California law. Witkin, 3 CALIFORNIA PROCEDURE § 104 (4th ed.1996); *see, e.g.*, *Peterson v. Kennedy*, 771 F.2d 1244, 1251 n. 4 (9th Cir.1985); *American Bank of Commerce v. Corondoni*, 169 Cal.App.3d 368, 215 Cal.Rptr. 331 (1985), and especially so where California's statute would bar a claim. California's interest in applying its own law is strongest when its statute of limitations is shorter than that of the foreign state, because a "state has a substantial interest in preventing the prosecution in its courts of claims which it deems to be 'stale.' Hence, subject to rare exceptions, the forum will dismiss a claim that is barred by its statute of limitations." Restatement (Second) of Conflict of Laws § 142, cmt. f (1988).

All the claims in the cases before us, other than those under the ATCA, have been stale for several decades under the applicable California statutes of limitations. *See* Cal. Code Civ. Proc. § 340 (one-year statute for personal injury torts, wrongful death and false imprisonment); *id.* § 338 (three-year statute for taking of or injury to personal property, and for fraud); Cal. Bus. & Prof. Code § 17208 (four-year statute for claims of unfair business practices). Only an extraordinarily strong interest of a foreign state in keeping these claims alive could overcome the presumption that California will not hear claims that have been stale for so long under its own law. No such strong foreign interest has been demonstrated here.

The statute of limitations under the ATCA is 10 years. *Doe v. Unocal Corp.*, __ F.3d __ (9th Cir.2002), 2002 U.S. App. LEXIS 19263, at *27.[18] Appellants have thus brought these claims far too late as well.[19]

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18. The 10-year limit is not stated in the provision. Rather, we adopted it from the Torture Victim Protection Act, *see* Pub.L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350, statutory notes) ("TVPA"), which has an explicit 10-year statute. *Papa v. United States*, 281 F.3d 1004, 1011-13 (9th Cir.2002). We did so because where a federal statute lacks a specified statute of limitations, courts apply the limitations period provided by the jurisdiction in which they sit unless "a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking."

Papa, 281 F.3d at 1011-12 (citing *North Star Steel Co. v. Thomas*, 515 U.S. 29, 35, 115 S.Ct. 1927, 132 L.Ed.2d 27 (1995)). We held that ATCA was closely analogous to the TVPA both in its purpose and in its mechanism for achieving that purpose. *Papa*, 281 F.3d at 1012. Appellants ask us to reconsider our decision in *Papa*, at least as it applies to the present cases, and hold that the ATCA is more closely analogous to section 354.6 than to the TVPA. The result, Appellants argue, would be that the claims are not barred until 2010. For the reasons we stated in *Papa*, and because we hold that section 354.6 is unconstitutional, we reaffirm that the ATCA statute of limitations in this case, as in other cases, is 10 years.

19. Some Appellants who did not bring a claim under the ATCA argue that they should be permitted to amend their complaints to do so. In light of our holding, such an amendment would be futile.

Some Appellants contend, however, that their claims under both state law and the ATCA are equitably tolled and could therefore survive our invalidation of section 354.6. Although the district court found that they did not allege facts sufficient to trigger equitable tolling, these Appellants contend that they were not required to allege such facts, because a statute of limitations is an affirmative defense, which a plaintiff is not required to anticipate in the complaint. They also contend that even if they were required to allege such facts, the district court should have granted them leave to amend in order to give them the ópportunity to do so. The curious aspect of this argument is that all of the Appellants who make this argument *did* plead equitable tolling in their complaints. Furthermore, they alleged *facts* that they believed would trigger such tolling. They alleged, for example, that the defendants had kept the plaintiffs ignorant of essential facts in the defendants' possession. The district court considered these alleged facts and found them insufficient to trigger tolling. *Forced Labor* (*Koreans*), 164 F.Supp.2d at 1181-82. Although the court's discussion of equitable tolling concerned only the ATCA, its reasoning applies equally to the state law claims. On appeal, these Appellants offer neither a satisfactory answer to the district court's finding regarding equitable tolling nor any hint of any additional facts that they might allege in an amended complaint. Under these circumstances, amendment would be futile. We therefore find no abuse of discretion in the district court's dismissal of the complaints with prejudice.[20]

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20. Deutsch argues for the first time on appeal that he should be permitted to amend his complaint to include a claim under the TVPA. He offers no explanation, however, for why he failed to bring

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IV. Jurisdiction

In many of the cases before us, there is indisputable federal jurisdiction. In some, for example in *Deutsch* and in *Dunn v. Nippon Steel Corp.*,[21] there is diversity jurisdiction. 28 U.S.C. § 1332. Appellants in several other cases, for

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that claim in his first amended complaint. Moreover, as noted above, the TVPA has an explicit statute of limitation of 10 years. Deutsch argues that that period commenced on the effective date of the Act, rather than on the date on which the injury was complete. He cites no authority for this proposition, and we do not find it to be a reasonable or plausible one. As Deutsch notes, we have held that the TVPA is applicable to acts that took place prior to the effective date of the Act. *Alvarez-Machain v. United States*, 107 F.3d 696, 702-03 (9th Cir.1996). In *Alvarez-Machain*, however, the plaintiff filed his claim only three years after the date of the alleged injury. *Id.* at 700. Nothing in our cases or the statute suggests that Congress intended the TVPA to open the federal courts to claims that were already more than 40 years old when the statute became effective or that no time limit exists under the TVPA as to the resurrection of claims for damages that may have occurred in the far distant past. Because the TVPA has a 10-year statute of limitations, permitting Deutsch to amend his complaint would be futile. We therefore affirm the dismissal with prejudice.

21. In *Dunn*, the amount in controversy is not stated in the complaint, nor was the amount determined by the district court. However, the Appellant seeks compensation and punitive damages for roughly three years of withheld wages, as well as for severe physical and mental injuries he suffered at the hands of the defendants and their predecessors during that time. There is thus no doubt that this case meets the $75,000 minimum amount in controversy required for diversity jurisdiction under 28 U.S.C. § 1332.

example in *Terrence v. Mitsui & Co.*, *Wheeler v. Mitsui & Co.*, and *Kim v. Ishikawajima Harima Heavy Indus. Co.*, assert claims under international law, thus giving rise to federal subject matter jurisdiction under 28 U.S.C. § 1331.

Among the many cases that have been consolidated, there are some individual cases as to which federal jurisdiction may be uncertain. Appellants in those cases originally sought relief in state court, under state law,[22] against non-diverse defendants. After removal and consolidation, some of the Appellants sought remand to state court. The district court denied their motions, *Forced Labor* (*Allied I*), 114 F.Supp.2d at 943, on the ground that "the complaints . . . , on their face, implicate the federal common law of foreign relations." *Id.* Appellees opposed remand on other grounds as well. Appellants in some of these cases—not precisely the same group that moved for remand below—now argue that federal jurisdiction is lacking.

Normally, of course, we would address all jurisdictional issues as an initial matter, as they would determine whether we could proceed to the merits. The situation is different with respect to the cases consolidated here, because the cases over which jurisdiction is disputed raise no merits issues that are not also raised by one or more cases over which jurisdiction is certain and which have been consolidated with the disputed cases. In short, we are compelled to address all of the merits issues in these consolidated cases, regardless

22. Although some plaintiffs amended or sought to amend their complaints, after removal, to include federal claims, such amendments do not bear on the evaluation of removal jurisdiction. *Abada v. Charles Schwab & Co.*, 300 F.3d 1112, 1117 (9th Cir.2002).

of whether there is jurisdiction over each of them. Furthermore, the ultimate survival of all of these cases depends on the validity of the provisions of section 354.6. In light of our holding that section 354.6 is unconstitutional, remand to state court of the cases of uncertain federal jurisdiction would be futile, as the state court would simply dismiss the claims with prejudice. *See Bates v. Jones*, 127 F.3d 870, 873 (9th Cir.1997) (noting that the California Supreme Court "has yet to disregard a directly applicable decision of this court on a question of federal law"). Therefore, our determination of the uncertain jurisdictional issues could have no effect on the outcome of any of the cases.

For these reasons, we decline to address the uncertain jurisdictional issues and simply affirm the district court's dismissal of all the cases before us.

Conclusion

For the foregoing reasons, we hold that California Code of Civil Procedure section 354.6 is an unconstitutional intrusion on the foreign affairs power of the United States and that Appellants' remaining claims are barred by the applicable statutes of limitations. The judgments of the district courts are

AFFIRMED.

Appendix A

ORDER AMENDING OPINION AND DENYING PETITIONS FOR REHEARING AND REHEARING EN BANC

REINHARDT, Circuit Judge.

The opinion filed January 21, 2003 is hereby amended as follows:

1. Slip op. at 991, second full paragraph, line 6, after "because a state is," insert "generally."

2. Slip op. at 991, replace the last sentence (beginning "Because section 354.6 is substantive law"), including footnote 4, with the following:

> Nevertheless, that distinction does not affect the outcome here. Our determination of the foreign affairs doctrine issue does not depend on our conclusion that section 354.6 is substantive law. Whether substantive or procedural, section 354.6 creates a special rule that applies only to a newly defined class of tort actions—actions brought by Second World War slave labor victims against the entities that enslaved them. This new rule profoundly alters the likelihood that such actions will succeed, by not only extending the statute of limitations for claims that were timely when the statute took effect (although we doubt that any such claims existed), but, far more important, by

reviving claims that were already time-barred. In the latter instance, the statute upset the repose of potential defendants. Such a revival of liability—even civil liability—is troubling and raises serious due process questions. We need not address those questions here, however. The important point for our foreign affairs analysis is that the California legislature created—or at least resurrected—a special class of tort actions, with the aim of rectifying wartime wrongs committed by our enemies or by parties operating under our enemies' protection.

3. Immediately following the passage inserted above (after "under our enemies' protection") add a new footnote containing the following text:

> Two decisions of the California Court of Appeal, one by the Second Appellate District and one by the Fourth, have recently addressed whether section 354.6 is substantive or procedural in nature. The decisions reached opposite conclusions. *Compare Mitsubishi Materials Corp. v. Superior Court*, 130 Cal. Rptr.2d 734, 2003 WL 253877, slip op. at 2 (Cal.Ct.App.2003) ("The legislation actually *creates* a state law claim which otherwise would not exist. . . .") *with Taiheiyo Cement Corp. v. Superior Court*, 129 Cal.Rptr.2d 451, 2003 WL 124284, slip op. at 24 (Cal.Ct.

App.2003) ("The sole purpose of section 354.6 is to extend the statute of limitations for common law claims for unpaid labor and personal injuries arising out of slave or forced labor."). Both decisions were issued after our opinion was sent to the Clerk for filing.

4. Slip op. at 1005, replace the first full paragraph with the following:

> Section 354.6 runs afoul of the restriction on the exercise of foreign affairs powers by the states. Because California lacks the power to create a right of action—or, alternatively, to resurrect time-barred claims—in order to provide its own remedy for war-related injuries inflicted by our former enemies and those who operated in their territories, we hold that section 354.6 is unconstitutional.

With these amendments, the panel has voted unanimously to deny the petitions for rehearing and rehearing en banc. The full court has been advised of the petitions for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35. The petitions for rehearing and rehearing en banc are denied.

The mandate will be held pending a decision in *American Insurance Association v. Garamendi*, __ U.S. __, 123 S.Ct. 817, 154 L.Ed.2d 768 (2003) (No. 02-722) (granting certiorari).

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED SEPTEMBER 17, 2001

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Master File No. MDL-1347

ORDER NO. 10

IN RE:

WORLD WAR II ERA JAPANESE FORCED LABOR LITIGATION,

This Document Relates To:

Choe v. Nippon Steel Corp., et al.,
ND Cal. No. 99-5309
Kim v. Ishikawajima Harima Heavy Industries Co., Ltd., et al.,
ND Cal. No. 99-5303
Oh v. Mitsui & Co., Ltd., et al.,
ND Cal. No. 00-3752
Sin v. Mitsui & Co., Ltd., et al.,
ND Cal. No. 00-3242
Su v. Mitsubishi Corp., et al.,
ND Cal. No. 00-3586
Sung, et al. v. Mitsubishi Corp., et al.,
ND Cal. No. 00-2358
Ma v. Kajima Corp., et al.,
ND Cal. No. 01-2592

Appendix B

The seven above-captioned cases are the only class actions remaining before the court in a set of consolidated cases in which World War II veterans forced to labor without compensation during World War II seek damages and other remedies from Japanese corporations or their successors in interest. These cases are brought by plaintiffs of Korean and Chinese descent. The other matters, which involved United States and Allied veterans, were previously dismissed because the 1951 Treaty of Peace with Japan waived all such claims. *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939, 942 (N.D. Cal.. 2000) (Order No. 4); *see also* Order No. 9. Defendants seek dismissal of the present cases as well.

The Korean and Chinese plaintiffs assert essentially the same claims as the United States and Allied veterans. Their primary cause of action arises under a statute enacted by the California legislature in 1999, California Code of Civil Procedure § 354.6. The statute attempts to provide a cause of action for all individuals forced to labor without compensation by "the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the [same regimes]" by extending the applicable statute of limitations to December 31, 2010. Cal. CCP § 354.6(a), (c). The crux of section 354.6 states:

> Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor

> performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate.

Id., subsection (b). The statute does not limit the cause of action to California residents. *See id.*, subsection (a).

The Korean and Chinese plaintiffs also seek compensation and restitution under various other state laws, and two of the seven complaints assert violations of international law.

Defendants argue that these cases must be dismissed for several reasons. Most significantly, defendants contend that section 354.6 is unconstitutional as applied against them. Notice of Claim of Unconstitutionality (Doc. # 243); Def. Br. (Doc. # 210) at 19-21; Def. Supp. Br. (Doc. # 336) at 1; *see also* United States Statement of Interest (SOI) (Doc. # 302) at 12-17. Defendants argue that application of the statute is unconstitutional because it infringes upon the federal government's exclusive power over foreign affairs and violates the Due Process clause of the Constitution.

Defendants also seek dismissal based on the following arguments: (1) the claims of these plaintiffs are barred by the applicable statute of limitations, (2) the 1951 Treaty of Peace with Japan and subsequent treaties entered by Japan with Korea and China combine to bar the claims, (3) the claims raise nonjusticiable political questions, (4) consideration of the claims violates the principles of international comity, (5) evaluating the claims would contravene the act of state

doctrine, (6) the doctrine of forum non conviens precludes this litigation in California and (7) the claims contravene the doctrine of foreign sovereign immunity.

The court concludes that section 354.6 is unconstitutional as applied to defendants in the case at bar because it infringes on the federal government's exclusive power over foreign affairs. To the extent the Korean and Chinese plaintiffs could assert claims under any other law, they are barred by the applicable statute of limitations and other principles of law.

I

Defendants move to dismiss pursuant to both FRCP 12(b)(6) and 12(c). Defendants move under both provisions because, consistent with the defendants in the Allied matters, some of the defendants have filed answers in the present cases while others have not. As the court noted in Order No. 4, the distinction between the two approaches is not important. The Ninth Circuit instructs that the standard for assessing a FRCP 12(c) motion is the same as the standard for a FRCP 12(b)(6) motion. *See Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co.*, 132 F.3d 526, 529 (9th Cir. 1997) (citations omitted). On such motions, all material allegations in the complaint at issue must be taken as true and construed in the light most favorable to the plaintiff. *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924, 928 (9th Cir. 1994). Dismissal is only appropriate when it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). These cases are subject to dismissal based on questions of law only.

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II

As touched upon above, the present cases involve plaintiffs of Korean and Chinese descent. These cases require analysis separate from the cases dismissed earlier not because the Korean and Chinese plaintiffs assert claims that are distinct from the claims of the United States and Allied veterans, but because the cases are brought on behalf of nationals of countries that were not signatories to the 1951 Treaty of Peace with Japan. The treaty was signed only by representatives of the United States and 47 other Allied powers and Japan. *See* Treaty of Peace with Japan, [1952] 3 UST 3169, TIAS No. 2490 (1951) (hereinafter, Treaty). Due to various historical and political circumstances during the time the treaty was negotiated and finalized, neither Korea nor China became a signatory to the treaty. *See* U.S. Dept of State, Record of Proceedings at the Conference for the Conclusion and Signature of the Treaty of Peace with Japan 84-85 (1951) (Exhibits in Support of Motion to Dismiss (Doc. # 212), Exh. B). As the chief negotiator for the United States, John Foster Dulles explained at the time that Korea was not a signatory because technically Korea was part of Japan until the war ended, and thus "Korea was never at war with Japan." *Id.* at 84. With respect to China, Dulles likewise explained that it could not be brought to the negotiating table because "civil war within China and the attitudes of the Allied Governments * * * created a situation such that there [was] not general international agreement upon a single Chinese voice with both the right and the power to bind the Chinese nation to terms of peace." *Id.* at 85.

Hence, although the treaty granted certain rights and benefits to Korea and China, the two countries simply were not signatories to the treaty. According to the plain text of the treaty, therefore, Korea and China do not qualify as "Allied Powers" subject to the waiver provision of Article 14(b). *See* Treaty at 3190. As a result, unlike the claims of the United States and Allied plaintiffs, the Treaty of Peace with Japan cannot be interpreted to waive the claims of the Korean and Chinese plaintiffs.

This circumstance creates a possible paradox that claims of non-Americans arising from forced labor experiences during World War II might be litigated in a court of the United States while the identical claims of American and Allied veterans are barred by the treaty. That possibility lays bare the significant foreign policy questions implicated in these cases and compels the court to address the constitutionality of the statute upon which they are based.

A

Before reaching the constitutional issues presented by these cases, the court must address whether the claims of the Korean and Chinese plaintiffs made under section 354.6 are preempted by the Treaty of Peace with Japan. Although defendants simply suggest this in passing, *see* Def. Br. (Doc. # 210) at 3-4, the United States asserts in its amicus curiae brief that the treaty preempts the claims of all non-Allied plaintiffs, *see* United States SOI (Doc. # 302) at 9-12. The Korean and Chinese plaintiffs do not directly address this argument. Nevertheless, the Supreme Court instructs that federal courts faced with both statutory questions and

constitutional questions should decide the former first in an attempt to avoid unnecessary constitutional inquiries. *See Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 343-44 (1999) (citations omitted); *see also Liberty Warehouse Co. v. Grannis*, 273 U.S. 70 (1927) (applying doctrine to a challenge to a state statute); *Mass. State Grange v. Benton*, 272 U.S. 525 (1926) (same).

As a preliminary matter, the court emphasizes that this inquiry is limited to whether the treaty preempts the claims of non-Allied plaintiffs only. To be sure, section 354.6 purports to provide a cause of action for other individuals as well. Indeed, section 354.6 appears to have been motivated mostly by a desire to give California, as opposed to foreign, "residents and citizens * * * a reasonable opportunity to claim their entitlement to compensation for forced or slave labor performed prior to and during the Second World War." Cal. CCP § 354.6, note § 1(c). But the only cases remaining before the court were brought by nationals of non-signatory nations. Accordingly, the question is not whether the treaty preempts section 354.6 generally, but whether the treaty preempts California's effort to supply a cause of action for non-Allied plaintiffs such as those of Korean and Chinese descent. This order addresses that issue only.

Under Article VI of the Constitution, the laws of the United States are "the supreme Law of the Land; * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. A treaty made by the President with the required approval of two-thirds of the Senate is part of the "supreme law of the land," and thus,

similar to federal statutes, valid treaties override any conflicting state law. *Missouri v. Holland*, 252 U.S. 416, 432 (1920); *see also Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). A treaty prevails whether it is ratified before or after the enactment of the conflicting state law. Laurence H Tribe, *American Constitutional Law* § 4-4 at 645 (3d ed. 2000) (hereinafter, Tribe) (citing *Nielsen v. Johnson*, 279 U.S. 47 (1929)).

Although the Supreme Court has written extensively about when congressional acts have preemptive effect, *see, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *United States v. Locke*, 529 U.S. 89 (2000), it has provided little guidance on the preemptive effect of treaties. For acts of Congress, the Court provides that such legislation preempts state law when (1) Congress expressly provided for preemption, (2) Congress intended to "occupy the field," or (3) the state law conflicts with the congressional statute at issue. *Crosby*, 530 U.S. at 372; *see also English v. General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990) (recognizing that these categories are not "rigidly distinct"). The Court has not established a similar detailed framework for courts to utilize when analyzing preemption by treaties. *See, e.g., United States v. Belmont*, 301 U.S. 324, 331 (1937) (noting, without any analysis, that treaties trump conflicting state laws). The Court has stated, however, that this preemption framework should not be applied "mechanically" when construing whether a treaty or international agreement preempts a state law because "the nation-state, not subdivisions within one nation, is the focus of the [treaty] and the perspective of our treaty partners." *See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 175 (1999). In order to determine whether a treaty trumps state law,

therefore, the court should assess the language of the treaty and "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Id.* at 167 (quoting *Air France v. Saks*, 470 U.S. 392, 399 (1985)). The court must "be governed by the text—solemnly adopted by the governments of many separate nations—whatever conclusions might be drawn from the intricate drafting history that [exists]." *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989).

With these principles in mind, the court looks first to Article 14(b) for an expression of the treaty's intent. As previously noted, this provision bars the claims of signatory nations and their nationals arising out of Japan's actions in the Second World War. *See In re World War II*, 114 F. Supp. 2d. at 944-45. To be sure, the signatory nations desired complete termination of all claims against Japan, but Article 14(b) has no effect on the claims of nationals from non-signatory nations. Hence, although from a perspective of 2001 it may seem anomalous for the United States to negotiate a treaty that bars the claims of its own nationals without a provision that forecloses resort to a judicial forum in the United States by nationals of non-signatory nations, Article 14(b) contains no express limitation against claims of non-signatory nationals. Little should be read into this omission, which most likely can be explained by the inconceivability a half century ago of such claims by non-signatory nationals being pursued in United States courts.

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Other relevant provisions of the treaty suggest that the treaty does not address claims of non-signatory nationals. Specifically, article 4(a), which addressed Japan's post-war relationship with Korea, provides:

> The disposition of property of Japan and of its nationals * * * and their claims, including debts, against [Korea], and the disposition in Japan of property of [Korean] authorities and residents, and of claims, including debts, of [Korean] authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and such authorities.

Treaty at 3173. Similarly, with respect to China, article 26 provides:

> Japan will be prepared to conclude with any State * * * which is not a signatory of the present Treaty, a bilateral Treaty of Peace on the same or substantially the same terms as are provided for in the present Treaty * * *.

Id. at 3190. These provisions suggest that the treaty contemplates resolution of war claims with Korea and China through agreements separate and distinct from the Treaty of Peace with Japan and separate agreements necessarily create the possibility that the terms for resolving those claims may differ from the terms of the treaty entered into by the Allied nations. The fact that the signatory nations encouraged such agreements does not show an intent to occupy the field of non-signatory nations' claims through the treaty. *See, e.g.*,

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Trojan Technologies, Inc. v. Com. of Penn., 916 F.2d 903, 906-07 (3d Cir. 1990) (refusing to find that an international free trade agreement preempted a state buy-American statute, in part, because the language in the agreement was "hortatory rather than mandatory"). Whether the agreements subsequently entered by Japan with Korea and China eliminated the claims of these non-signatory nations does not bear on whether the Treaty of Peace with Japan preempts claims of Chinese and Korean nationals. The court reads the language of articles 4(a) and 26 to suggest only that the signatory nations, including the federal government of the United States, did not intend the Treaty of Peace with Japan to control claims of individuals from non-signatory nations.

To the extent section 354.6 provides a cause of action to such individuals, therefore, it does not conflict with the expressed intent of the treaty. Accordingly, the treaty itself does not trump the California law in this respect.

B

Simply because the claims of the Korean and Chinese plaintiffs derived from section 354.6 are not preempted by the Treaty of Peace with Japan does not mean that they can go forward, however. Providing a cause of action for these individuals triggers significant constitutional questions. Section 354.6 is unconstitutional because it infringes on the exclusive foreign affairs power of the United States.

Relative to many of the federal government's powers, the contours of the foreign affairs power has been infrequently analyzed and even less frequently clarified. Nevertheless, the

national government's exclusive authority to regulate the foreign affairs of the United States has long been recognized as a constitutional principle of broad scope. *See United States v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941); *Belmont*, 301 U.S. at 331; *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). "It follows that all state action, whether or not consistent with current foreign policy, that distorts the allocation of responsibility to the national government for the conduct of American diplomacy is void as an unconstitutional infringement on an exclusively federal sphere of responsibility." Tribe, § 4-5 at 656.

This principle, which prohibits state action that unduly interferes with the federal government's authority over foreign affairs derives from both the text and structure of the Constitution. The Constitution allocates power for external affairs to the legislative and executive branches of the national government and simultaneously prohibits the states from engaging in activities that might interfere with the national government's exercise of these powers. To be sure, there is no clause in the Constitution that explicitly grants a "foreign affairs power" to the federal government. *See* L. Henkin, *Foreign Affairs and the United States Constitution* 14-15 (2d ed. 1996) (hereinafter, Henkin). But a number of provisions, when read together, strongly imply that such authority was intended. *See* Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 Am. J. Int'l. L. 832, 832 (1989) (hereinafter, Maier) ("[N]either the Articles of Confederation nor the Constitution provided

for a general foreign affairs power. Nonetheless, there was never any real question that the United States would act as a single nation in the world community.").

Specifically, the Constitution provides that Congress possesses the authority "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States," U.S. Const. art. I, § 8, cl. 1, "[t]o regulate Commerce with foreign Nations," *id.*, cl. 3, and "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," *id.*, cl. 10. In addition, while Congress is granted the power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," *id.*, cl. 11, the President is designated the "Commander in Chief of the Army and Navy of the United States," *id.*, art. II, § 2, cl. 1. The President also is given the authority to "make Treaties" and "appoint Ambassadors" with the "Advice and Consent of the Senate," *id.*, cl. 2, and to "receive Ambassadors and other public Ministers," *id.*, § 3.

With respect to the states, the Constitution directs that "[n]o State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal" or, without the consent of Congress, "lay any Imposts or Duties on Imports or Exports" or "enter into any Agreement or Compact * * * with a foreign Power," or "engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." *Id.*, § 1, cl. 10.

These and other constitutional provisions evidence an intent on the part of the framers to grant paramount authority for foreign affairs to the political branches of the federal government, thereby necessitating the exclusion of intrusive efforts on the part of the states in foreign relations. The Federalist Papers bolster this interpretation. *See Hines*, 312 U.S. at 64 n.9 ("The importance of the national power in all matters relating to foreign affairs and the inherent danger of state action in this field are clearly developed in [the] Federalist papers * * *."). For example, James Madison wrote: "This class of powers forms an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations." The Federalist No. 42, at 264 (C. Rossiter ed. 1961). Similarly, Alexander Hamilton argued, albeit with respect to the related but explicit foreign commerce power of the national government, that

> [t]he interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.

The Federalist No. 22, at 144-45 (C. Rossiter ed. 1961). And as noted in *Hines*, "Thomas Jefferson, who was not generally favorable to broad federal powers, expressed a similar view

in 1787: 'My own general idea was, that the States should severally preserve their sovereignty in whatever concerns themselves alone, and that whatever may concern another State, or any foreign nation, should be made a part of the federal sovereignty.' " *Hines*, 312 U.S. at 64 n.11 (quoting *Memoir, Correspondence and Miscellanies from the Papers of Thomas Jefferson* (1829), vol. 2, p. 230, letter to Mr. Wythe).

The Supreme Court has long acknowledged the federal government's broad authority over foreign affairs. In 1937, for example, Justice Sutherland noted that "complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states." *Belmont*, 301 U.S. at 331. Similarly, Justice Black observed a few years later that "[o]ur system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Hines*, 312 U.S. at 63. To be certain, the holdings of these and other decisions from the same time period were predominantly based on the supremacy of federal law; the Court determined that the state legislation at issue in these cases was preempted by existing federal law or international agreements. But the early observations contained in these cases regarding the national government's broad authority over foreign affairs are instructive because they describe the principles upon which the Supreme Court later relied in *Zschernig v. Miller*, 389 U.S. 429 (1968), to announce the foreign affairs doctrine that governs the case at bar.

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In *Zschernig*, the Supreme Court observed that the Constitution entrusts "the field of foreign affairs * * * to the President and the Congress." *Id.* at 432 (citing *Hines*, 312 U.S. at 63). The Court concluded that, as a result, the Constitution itself excludes state intrusion on the federal government's authority over foreign affairs even when the federal branches have not acted. *Id.* at 432, 441; *see also* Henkin at 164. Pointing to the broad principle articulated in *Hines*, the Court stated that "even in the absence of a treaty [or other federal law], a State's policy may disturb foreign relations. * * * If there are to be such restraints, they must be provided by the Federal Government." *Zschernig*, 389 U.S. at 441. In short, the Court concluded that state statutes "must give way if they impair the effective exercise of the Nation's foreign policy." *Id.* at 440.

Zschernig involved an Oregon probate statute that conditioned the inheritance rights of an alien not residing in the United States on his ability to prove that American heirs would have a reciprocal right to inherit estates in the foreign country and that he would receive payments from the Oregon estate "without confiscation, in whole or in part, by the governments of such foreign countries." *Id.* at 430. The Supreme Court noted that it had earlier refused to invalidate a similar statute enacted by California "on its face" because that statute "would have only 'some incidental or indirect effect in foreign countries.' " *Id.* at 432-33 (quoting *Clark v. Allen*, 331 U.S. 503, 517 (1947)). In *Zschernig*, however, the Court assessed "the manner of [the Oregon statute's] application" and observed that the law had compelled state courts to "launch[ ] inquiries into the type of governments that obtain in particular foreign nations." *Id.* at 434. The Court

noted, for example, that the statute triggered assessments of "the actual administration of foreign law" and "the credibility of foreign diplomatic statements." *Id.* at 435. In short, the statute "seem[ed] to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own." *Id.* at 440. Looking at these effects of the Oregon statute, the Court concluded that it was unconstitutional because it "affect[ed] international relations in a persistent and subtle way," had a "great potential for disruption or embarrassment" and triggered "more than 'some incidental or indirect effect in foreign countries.' " *Id.* at 434-35, 440.

Zschernig thus stands for the proposition that states may legislate with respect to traditional state concerns, such as inheritance and property rights, even if the legislation has international implications, but such conduct is unconstitutional when it has more than an "incidental or indirect effect in foreign countries." *Id.* at 440. As the First Circuit recently stated, under *Zschernig* "there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed." *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 49-57 (1st Cir. 1999), aff'd on other grounds sub nom, *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). Or, as the Third Circuit has summarized the doctrine, if a state law were to "involve[ ] the state in the actual conduct of foreign affairs[, the statute] is unconstitutional." *Trojan*, 916 F.2d at 913 (citing *Pink*, 315 U.S. 203).

This doctrine makes sense because the nation as a whole is affected when state-driven foreign policy has an impact on other countries. *See* Lori A. Martin, *The Legality of*

Nuclear Free Zones, 55 U. Chi. L. Rev. 965, 993 (1988). Indeed, for that very reason states have inadequate incentive to consider the effects of their actions on foreign relations. *See id. Zschernig* thus enables the courts to ensure that the states have not overstepped the line at the risk of endangering the nation as a whole.

Before evaluating section 354.6 in this regard, the court rejects the Korean and Chinese plaintiffs' suggestion that *Zschernig* is no longer valid. To be sure, some commentators have suggested that the reach of the Court's holding in *Zschernig* should be limited. *See, e.g.*, Henkin at 165 n.* *; Curtis A Bradley & Jack L. Goldsmith, *Customary International Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 865 (1997); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1698-1706 (1997); Peter J Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 Va. J. Int'l. L. 121, 161-74 (1994); but *see* Tribe § 4-5 at 656-57; Maier at 832-33. But *Zschernig* has not been overruled, and thus the constitutional principles it enunciates remain the law. *See Natsios*, 181 F.3d at 59 ("[T]here is simply no indication, in * * * any * * * post-*Zschernig* case, that *Zschernig* is not good law and is not binding on us."). California and all states enacting legislation touching upon foreign affairs are thus bound by the doctrines of *Zschernig* until the Supreme Court instructs otherwise. As the Ninth Circuit has noted on numerous occasions, "speculation" about the continuing vitality of Supreme Court precedent "does not permit us to ignore [such] controlling * * * authority." *United States v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir. 2001) (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (directing

that lower courts should leave to the Supreme Court "the prerogative of overruling its own decisions") (citation omitted)); *see also Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1057 (9th Cir. 2000) (citing *Agostini* and noting same); *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1192 (9th Cir. 1998) (same).

Indeed, on two recent occasions the Ninth Circuit has recognized the continuing vitality of *Zschernig*. *See Gerling Global Reinsurance Corp. of America v. Low*, 240 F.3d 739, 751-53 (9th Cir. 2001); *Int'l Assoc. of Indep. Tanker Owners v. Locke*, 148 F.3d 1053, 1068 (9th Cir. 1998), rev'd on other grounds sub nom *United States v. Locke*, 529 U.S. 89 (2000). In *Tanker Owners*, the Ninth Circuit rejected an argument that oil regulations promulgated by the state of Washington were unconstitutional under *Zschernig* because the litigant "failed to demonstrate that, even if those regulations [had] some extraterritorial impact, that impact [was] more than 'incidental or indirect.' " *Tanker Owners*, 148 F.3d at 1069 (quoting *Zschernig*, 389 U.S. at 434). The decision affirms, therefore, that when a litigant makes a showing that the statute at issue triggers "more than 'some incidental or indirect effect in foreign countries,' " the statute is unconstitutional as an intrusion on the federal government's foreign affairs power. *See id.* (quoting *Zschernig*, 389 U.S. at 434).

Similarly, in *Gerling*, although the Ninth Circuit declined to apply *Zschernig* to California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA), Cal. Ins. Code §§ 13800-13807, *see Gerling*, 240 F.3d at 753, the court did not suggest that *Zschernig* is no longer valid. Rather, the court concluded that the HVIRA did not trigger the concerns implicated by

the statutes in *Zschernig* and cases applying its doctrine. *See id.* The court stated that it "hesitate[d] to apply *Zschernig* to a facial challenge to state statutes involving 'foreign affairs' (a) but that mainly involve[d] foreign commerce and (b) that [were] not directed at a particular country." *Id.* The court also suggested that it was hesitant to apply *Zschernig* because "there is no evidence that HVIRA would implicate the diplomatic concerns mentioned in *Zschernig*." *Id.* By implication, therefore, the Ninth Circuit would apply *Zschernig* to state statutes that do not regulate commerce, are directed at a particular country or implicate the diplomatic concerns present in *Zschernig*.

In addition, other courts have applied the principles of *Zschernig* to strike down state or local laws. *See, e.g.*, *Natsios*, 181 F.3d 38, 49-61 (finding that the Massachusetts Burma Law, which restricted the ability of Massachusetts and its agencies from purchasing goods or services from companies that did business with Burma (Myanmar), was unconstitutional, in part, as a "threat to [the] federal foreign affairs power"); *Tayyari v. New Mexico State University*, 495 F. Supp. 1365, 1376-79 (D. N.M. 1980) (striking down a University's policy designed to "rid the campus of Iranian students" because it conflicted with a federal regulation and "frustrate[d] the exercise of the federal government's authority to conduct the foreign relations of the United States"); *Springfield Rare Coin Galleries v. Johnson*, 503 N.E.2d 300, 305-07 (Ill. 1986) (invalidating an Illinois statute that excluded South Africa from a tax exemption as more than an "incidental" intrusion on the federal government's foreign affairs power); *New York Times Co. v. City of New York Commission on Human Rights*, 361 N.E.2d

963, 969 (N.Y. 1977) (striking down a New York City antidiscrimination statute because it "interfere[d] with the foreign policy authority of the Federal Government"); *Bethlehem Steel Corp. v. Board of Commissioners*, 276 Cal. App. 2d 221, 227-29, 80 Cal. Rptr. 800 (1969) (invalidating a California Buy American statute because it had "more than 'some incidental effect in foreign countries' and * * * great potential for disruption * * *.").

The infrequency with which *Zschernig* has been applied over the years does not suggest a weakening in the doctrine. To the contrary, it shows that the federal government has affirmatively enacted legislation or international agreements in most areas of foreign relations that expressly preempt conflicting state and local legislation under the Constitution's Supremacy clause, thereby obviating the need for analysis under *Zschernig*. *See, e.g., Crosby*, 530 U.S. 363 (affirming invalidity of the Massachusetts Burma law on preemption grounds). It also suggests that, despite several high profile examples of international involvement, state and local authorities tend to focus on state and local issues. *See* Howard N. Fenton III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 Nw. J. Int'l. L. & Bus. 563, 564 (1993). Indeed, most actions by states and municipalities that directly address foreign policy issues do not raise the type of diplomatic concerns expressed by the Court in *Zschernig*. For example, local authorities seeking to make international statements often enact non-binding resolutions or form sister-city relationships with foreign communities. *See id.* Section 354.6 represents a much greater foray into the field of foreign affairs.

Turning to an analysis of section 354.6, the court reiterates that under *Zschernig*, California may legislate with respect to local concerns that touch upon foreign affairs, but only if its actions have just "some incidental or indirect effect in foreign countries." *Zschernig*, 389 U.S. at 433 (quoting *Clark*, 331 U.S. at 517). The court concludes that section 354.6, as applied to defendants here, clearly crosses this "forbidden line." *See Clark*, 331 U.S. at 517.

The court's conclusion is mandated by the following observations: (1) the terms of section 354.6 and its legislative history demonstrate a purpose to influence foreign affairs directly, (2) the statute targets particular countries, (3) the statute does not regulate an area that Congress has expressly delegated to states to regulate, (4) the statute establishes a judicial forum for negative commentary about the Japanese government and Japanese companies, (5) the Japanese government asserts that litigation of these claims could complicate and impede diplomatic relationships of the countries involved, and (6) the United States, through the State Department, contends that section 354.6 impermissibly intrudes upon the foreign affairs power of the federal government.

First, the language of section 354.6 and the contemporaneous comments of its creators demonstrate that the statute embraces a foreign policy purpose, namely, to provide a mechanism for individuals to obtain war-related reparations. By its terms, the statute purports to enable individuals from any country forced to labor during World War II by the Japanese government or Japanese companies "to recover compensation" for such labor. *See* Cal. CCP § 354.6(b).

Moreover, as the notes to the statute indicate, the legislature determined that the "victims of Nazi [and Japanese] persecution have been deprived of their entitlement to compensation [earned] during the Second World War." *Id.*, note § 1(b). Indeed, Governor Gray Davis stated shortly after signing the bill that the law would "help right a historic wrong which occurred over 50 years ago during World War II when men, women and children were forced into slave labor." *See* Henry Weinstein, *Bill Signed Bolstering Holocaust-Era Claims*, LA Times, July 29, 1999, at A3. The author of the measure, Senator Tom Hayden, similarly asserted at the time:

> [Section 354.6] sends a very powerful message from California to the U.S. government and the German government, who are in the midst of rather closed negotiations about a settlement. * * * If the international negotiators want to avoid very expensive litigation by survivors as well as very bad public relations for companies like Volkswagen and Ford, they ought to settle. * * * Otherwise, this law allows us to go ahead and take them to court.

Id. Since the statute purports to create a cause of action for compensation from companies related to "the Nazi regime, its allies or sympathizers," it cannot be doubted that the same message is intended for the Japanese government and Japanese corporations.

These issues and determinations which underlie section 354.6 are thus identical to the "uniquely federal" reparations concerns that were addressed by the United States while

negotiating the Treaty of Peace with Japan. *See In re World War II*, 114 F. Supp. 2d at 946; *see also Ware*, 3 U.S. (3 Dall.) at 199, 230 (establishing that the war-related claims of individual citizens can only be brought by their government); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 273-74 (D. N.J. 1999) (noting same). By establishing California courts as an avenue for reparations, therefore, section 354.6 engages California in the uniquely federal foreign policy function of addressing claims for reparations that arise in the aftermath of a war.

Second, section 354.6 targets particular countries by allowing a cause of action against companies that transacted business in any of the areas occupied by "the Nazi regime, its allies or sympathizers." *See* Cal. CCP § 354.6. Because the statute singles out such a narrow set of countries—most notably, Germany and Japan—it suggests that California intended the statute to send an explicit foreign relations message, rather than simply to address some local concern.

As a contrast, in *Trojan* the Third Circuit upheld a Pennsylvania "Buy American" law, in part, because "the statute applie[d] to steel from *any* foreign source, without respect to whether the country might be considered friend or foe." *Trojan*, 916 F.2d at 913 (emphasis added). By not singling out a particular country or set of countries, the Pennsylvania statute implicitly focused on a local concern (the local steel industry), as opposed to engaging in international relations directly with a particular country or set of countries.

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The Korean and Chinese plaintiffs point out that the Ninth Circuit referred to this characteristic of the law in *Trojan* when assessing the applicability of *Zschernig* to the HVIRA, implying that this court should do the same with respect to section 354.6. *Gerling*, 240 F.3d at 752-53. As discussed, the *Gerling* court was hesitant to apply *Zschernig*, in part, because the HVIRA was not directed at a particular country. *Id.* at 753. But, in this regard, section 354.6 is significantly different from the HVIRA. While section 354.6 is aimed at a few specific countries, the HVIRA applied to insurers from any country. *See* Cal. Ins. Code § 13804(a) ("*Any* insurer * * * that sold * * * insurance policies * * * to persons in Europe, which were in effect between 1920 and 1945 [must file certain information with the insurance commissioner]."") (emphasis added). Thus, the *Gerling* court's reliance on this observation in *Trojan* to minimize the foreign affairs effect of the HVIRA suggests the opposite conclusion for section 354.6.

With respect to this point, therefore, section 354.6 is closer to the statute struck down by the Supreme Court in *Zschernig*. The Oregon statute at issue was generally applied only against residents of a narrow set of countries (those "established on a more authoritarian basis than our own"); section 354.6 similarly applies only against companies of a narrow set of countries. Indeed, section 354.6 targets an even smaller set of countries than the law at issue in *Zschernig*. The California law's focus on a few particular countries, therefore, further evidences an intrusion by the state on the field of foreign affairs.

Third, section 354.6 does not regulate an area that Congress has expressly delegated to the states. In fact, by establishing a mechanism for forced labor victims to obtain war reparations, the statute relates to a subject that has always been addressed at the federal level. To the contrary, the HVIRA regulates insurance companies, which, as the *Gerling* court noted, has been deemed by the Supreme Court to be "a local matter." *Gerling*, 240 F.3d at 744 (citing *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 302 (1960)). At bottom, therefore, the "HVIRA is a California insurance regulation of California insurance companies * * *." *Id.* at 746. The Ninth Circuit's hesitancy to apply *Zschernig* to a constitutional challenge of the HVIRA because the law regulated an area of commerce for which Congress had expressly delegated the regulatory power to the states is thus irrelevant to the court's analysis here. Accordingly, section 354.6 cannot be validated as a regulation of a local concern in the same manner as the HVIRA. The Korean and Chinese plaintiffs do not contend otherwise.

Fourth, because section 354.6 opens the door to lawsuits about the conduct of the Japanese government and Japanese companies during the Second World War, the primary dangers of the Oregon statute that concerned the Court in *Zschernig* are likewise triggered here. Specifically, such litigation cannot be carried to fruition without making "unavoidable judicial criticism" of the efforts of Japan and its war industry. *See Zschernig*, 389 U.S. at 440. To be sure, the commentary would by necessity focus on the past, but, particularly given the fact that it would emanate from the official forum of American courts, Japan's current regime could not avoid being negatively implicated by association. It seems beyond

doubt, therefore, that the statute has the potential to have an impact on foreign relations between the United States and Japan "in a persistent and subtle way." *See id.*

Fifth, and related to the court's fourth observation, the Japanese government has made clear that it is concerned about the effects of section 354.6 on Japan's relationship with the United States. *See* Views of the Government of Japan, United States SOI (Doc. # 302), Exh. 1. In a submission to this court by the Embassy of Japan, the Japanese government points out that the claims of the Korean and Chinese plaintiffs have already been settled or are in the process of being settled through diplomatic negotiations between Japan, China, and North and South Korea. *See id.* at 5. California's efforts to provide an alternative forum for these claims interferes with Japan's diplomatic efforts and credibility in this regard. As Japan states:

> Permitting plaintiff's claims will put the courts in the United States in an unwarranted place to inevitably affect relations between the countries concerned, including the bilateral settlement reached after highly political and sensitive negotiations. Such involvement of the courts in the United States could complicate and impede relationships between Japan and those countries as well as the bilateral relationship between the United States and Japan. The Government of Japan is convinced that these issues should not be adjudicated in the courts in the United States.

Id. To be sure, the court recognizes that Japan has a financial interest in repressing any demands for further compensation against its nationals arising out of the war. But Japan's submission nevertheless serves as a reminder that the United States also has its own interest in maintaining normal diplomatic relations with Japan. The protests of the Japanese government thus demonstrate that section 354.6 has "great potential for [causing] disruption or embarrassment" here in the United States. *See Zschernig*, 389 U.S. at 435.

Finally, the federal government, as represented by the State Department, agrees with defendants that section 354.6 impermissibly intrudes on the foreign affairs power of the federal government. *See* United States SOI (Doc. # 302) at 12-16. The State Department represents one of the two political branches with the exclusive authority to handle the country's foreign affairs, and thus it is in a good position (and certainly better position than this court) to determine if that power has been intruded upon. In this regard, the government asserts:

> By enacting the statute, California has created its own policy in a particular area of foreign relations—one which judges the activities of foreign governments and corporations during * * * World War II, and the treaties and agreements Japan and other nationals made in the wake of the war. If each state were free to impose burdens that diverge from the foreign policy interests of the nation as a whole as expressed by the President and to have its own foreign policy, it would * * * significantly diminish the

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> President's "economic and diplomatic leverage" and, hence, his authority to negotiate agreements with foreign governments.

Id. at 16 (citation omitted). The court finds it notable that the Supreme Court concluded that application of the law at issue in *Zschernig* was unconstitutional even though the federal government had submitted an amicus curiae brief in which it stated that "[t]he government does not * * * contend that the application of the * * * statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations." *Zschernig*, 489 U.S. at 434-35. Section 354.6, to the contrary, has triggered the opposite reaction from the federal government. Accordingly, the concerns of the State Department further persuade the court to conclude that an application of section 354.6 to defendants here cannot pass constitutional muster.

The few arguments of the Korean and Chinese plaintiffs in opposition to this conclusion are unpersuasive.

First, the Korean and Chinese plaintiffs make much of the distinction between facial and as applied challenges to the constitutionality of a statute. Specifically, they argue that *Zschernig*, which the Court framed as an as-applied analysis, cannot govern the present inquiry because defendants have challenged the validity of section 354.6 on its face. *See* Pl. Supp. Br. (Doc. # 323) at 6-7. But the Korean and Chinese plaintiffs are simply incorrect; defendants, in fact, challenge section 354.6 as it applies to them. *See* Def. Supp. Br. (Doc. # 336) at 1. As the Court established long ago, the proper method for adjudicating the constitutionality of

a statute is for the affected parties to challenge the statute at issue as applied to them. *See United States v. Raines*, 362 U.S. 17, 20-21 (1960). In *Raines*, the Court made clear that "[t]he very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them." *Id.*; *see also United States v. Kurt*, 988 F.2d 73, 76 (9th Cir. 1993) ("A defendant cannot claim a statute is unconstitutional in some of its reaches if the statute is constitutional as applied to him.") (citing *Raines*, 362 U.S. at 21-22); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1324 (2000) (concluding that "there is no single distinctive category of facial, as opposed to as-applied, litigation. Rather, all challenges to statutes arise when a particular litigant claims that a particular statute cannot be applied against her.").

To be sure, both the Supreme Court and the Ninth Circuit have cited this distinction as a factor influencing their analyses under the foreign affairs doctrine. *See Zschernig*, 389 U.S. at 433 (distinguishing *Clark*, in which the Court had refused to strike down a similar California statute, as addressing a challenge to the statute on its face); *Gerling*, 240 F.3d at 752 (noting that the HVIRA was challenged on its face). But given the posture of the challenge to section 354.6 brought by defendants, the court is not persuaded by the efforts of the Korean and Chinese plaintiffs to cloud the analysis here.

The Korean and Chinese plaintiffs also contend that because defendants are businesses, as opposed to foreign governments, section 354.6 does not implicate *Zschernig's*

foreign affairs doctrine. *See* Pl. Supp. Br. (Doc. # 323) at 8. But such a contention does square with their complaints, in which the Korean and Chinese plaintiffs emphasize that the conduct of the Japanese companies during the war was condoned and controlled by the Japanese government. *See, e.g., Sung* Compl., ¶ 10 ("The Japanese government set up programs whereby Japanese companies (including defendants) could use civilian internees as slaves or forced laborers."); *Oh* Compl., ¶¶ 65, 67 ("In August 1936, Japanese Army General Minami Jiro was appointed Governor-General of Korea. Under his control private Japanese companies, including the Defendants, expanded those industries in Korea critical to Japan's war-making ability. * * * Japan enacted laws applicable to Korea forcing Koreans to labor in certain industries."). The Japanese government, as opposed to just these private defendants, is clearly implicated by the claims asserted under section 354.6 by the Korean and Chinese plaintiffs.

Even if these cases could somehow be characterized as claims between private parties, *Zschernig* clearly instructs that an application of state legislation that has more than "some incidental or indirect effect *in foreign countries*" is invalid. *See Zschernig*, 389 U.S. at 434 (emphasis added). Whether section 354.6 is applied to businesses or the Japanese government, the statute certainly has an effect in Japan.

Finally, the Korean and Chinese plaintiffs also suggest that since Congress has not addressed the subject matter here—forced labor compensation claims against Japanese companies—then there is no federal policy or legislation

with which section 354.6 may conflict. *See* Pl. Supp. Br. (Doc. # 323) at 8. To be sure, this argument would be relevant if the court were analyzing whether section 354.6 violated the federal government's foreign commerce authority. *See Gerling*, 240 F.3d at 743-51. As already discussed, however, the foreign affairs doctrine prohibits state and local intrusion into the field of foreign relations regardless whether a conflicting federal law or policy exists. *See* Tribe, § 4-5 at 656 ("[A]ll state action, whether or not consistent with current federal foreign policy, that distorts the allocation of responsibility to the national government for the conduct of American diplomacy is void * * *."). It is the intrusion itself, which *could* inhibit the federal government's ability to "deal with those problems," that makes the application of such legislation unconstitutional. *See Zschernig*, 389 U.S. at 441. The federal government's actual policy, therefore, is irrelevant to the court's analysis.

Based on the foregoing observations, the court concludes that applying section 354.6 to defendants will "affect[ ] international relations in a persistent and subtle way," have a "great potential for disruption or embarrassment" in the United States and trigger "more than some incidental or indirect effect" in Japan. *See Zschernig* at 434-35, 440. As a result, California's attempt to provide a cause of action to the Korean and Chinese plaintiffs against defendants is an unconstitutional intrusion on the exclusive foreign affairs power of the federal government.

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III

In light of the court's conclusion that the application of section 354.6 to defendants is unconstitutional, the Korean and Chinese plaintiffs may not rely on the California statute to pursue their claims against defendants. The Korean and Chinese plaintiffs contend, however, that they allege claims that arise under other statutes as well, namely the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, and various California laws. The court addresses these claims now.

A

The court turns first to the Korean and Chinese plaintiffs' purported claims under the ATCA. Although no reference is made to the ATCA in any of the seven complaints, the Korean and Chinese plaintiffs place extensive reliance on the statute and the few decisions interpreting it to oppose defendants' motions to dismiss.

The ATCA, originally enacted by the 1st Congress in the Judiciary Act of 1789, provides that

> [t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350. In the Ninth Circuit, section 1350 provides both federal jurisdiction and a substantive right of action for certain violations of customary international law. *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d

1467, 1474-76 (9th Cir. 1994) (*Marcos II*); *see also Alvarez-Machain v. United States*, 107 F.3d 696, 703 (9th Cir. 1997). In order to state a claim under the ATCA, a plaintiff must allege (1) a claim by an alien, (2) asserting a tort (3) committed in violation of the law of nations (i.e., international law). *See Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1303 (C.D. Cal. 2000). To be actionable under section 1350, an alleged violation must be of an international norm that is "specific, universal and obligatory." *See Marcos II*, 25 F.3d at 1475 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984)).

Defendants do not challenge that the elements for a claim under section 1350 have been satisfied here. With respect to the first two elements, most of the Korean and Chinese plaintiffs reside outside of the United States and the type of actions that defendants are alleged to have committed during the Second World War inflicted personal injuries that sound in tort. Regarding the third element, two of the seven complaints allege that the defendants forced the plaintiffs to labor without compensation in violation of their rights under international law. *See Kim* Compl., ¶¶ 76-79, 81; *Choe* Compl., ¶ 81.

Whether requiring individuals to engage in forced and slave labor meets the "specific, universal and obligatory standard" required to violate the law of nations has not been specifically addressed by the Ninth Circuit. Cf. *Marcos II*, 25 F.3d at 1475 (finding that official torture violates the law of nations). To be sure, the Ninth Circuit has noted in passing that slavery violates a *jus cogens* norm. *United States v.*

Matta-Ballesteros, 71 F.3d 754, 764 n.5 (9th Cir. 1995) (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-15 (9th Cir. 1992)). Such norms are "nonderogable and peremptory, enjoy the highest status within customary international law, are binding on all nations, and can not be preempted by treaty." *Id.* (citation omitted). It remains unclear, however, whether all *jus cogens* norms meet the "specific, universal and obligatory standard" required to be actionable under section 1350.

Courts faced with making this determination may be guided by judicial decisions enforcing the law of nations, the work of jurists and the general usage and practice of nations. *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998) (citing *Siderman*, 965 F.2d at 714-15); *see also United States v. Smith*, 5 Wheat. 153, 18 U.S. 153, 160-61 (1820). In this regard, a district court in New Jersey addressing forced labor claims under the ATCA against Ford Motor Company recently concluded that "[t]he use of unpaid, forced labor during World War II violated clearly established norms of international law." *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 440 (D. N.J. 1999). As that court reasoned, this conclusion is supported by the following: (1) the Nuremberg Tribunals held that enslavement and deportation of civilian populations during the war constituted a crime against humanity in violation of international law, *id.* (citing R. Jackson, *The Nuremberg Case* xiv-xv (1971)); (2) the Nuremberg Principle IV(b) provides that the "deportation to slave labor * * * of civilian populations of or in occupied territory" constitutes both a "war crime" and a "crime against humanity," *id.* (quoting Nuremberg Charter, annexed to the London Agreement on War Criminals,

Aug. 8, 1945, art. 6, 59 Stat. 1544, 82 UNTS 279); and (3) several American and German jurists have stated that conduct related to slave labor violates international law, *id.* at 440-41 (citing *Handel v. Artukovic*, 601 F. Supp. 1421, 1426 n.2 (C.D. Cal. 1985); *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1996); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1180 (D.C. Cir. 1994) (Wald, J, dissenting); *Siderman*, 965 F.2d at 715; *Tel-Oren*, 726 F.2d at 781 (Edwards, J, concurring); LG [District Court of Germany] Bremen, 1 O 2889/90 at 7 (1998) (FRG); *Krakauer v. Federal Republic of Germany*, LG [District Court of Germany] Bonn, 1 O 134/92, at 21 (1997) (FRG), rev'd on other grounds, OLG [Court of Appeals] Cologne, 7 U 222/97 (1998) (FRG)).

Given the Ninth Circuit's comment in *Matta-Ballesteros*, 71 F.3d at 764 n.5, that slavery constitutes a violation of *jus cogens*, this court is inclined to agree with the *Iwanowa* court's conclusion that forced labor violates the law of nations. Indeed, it seems beyond doubt that the forced labor practices of defendants during the Second World War violated traditional international law. But such conduct took place over 50 years ago. To the extent the Korean and Chinese plaintiffs have asserted claims under the ATCA for conduct taking place during World War II, the court concludes that the claims must be dismissed because they are time-barred.

Although the ATCA itself does not contain a statute of limitations, when a cause of action under federal civil law does not have a directly applicable limitations period, the Supreme Court has instructed that the court should not assume that no time limit for the cause of action was intended. *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151,

158 (1983). Instead, the court must "borrow" the most suitable limitations period from some other source, traditionally, the law of the forum state. *Id.*; *see also* Wright & Miller, 19 *Federal Practice and Procedure* § 4519 at 595 (West Publishing Co. 1996). Since "[s]tate legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies," however, the Supreme Court has recognized a narrow exception to the general rule that statutes of limitation are to be borrowed from state law. *Reed v. United Transportation Union*, 488 U.S. 319 (1989) (quoting *Occidental Life Ins. Co. of California v. EEOC*, 432 U.S. 355, 367 (1977)). Specifically, the court should not borrow the state limitations period "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial law-making." *Id.* (quoting *DelCostello*, 462 U.S. at 172).

With these principles in mind, the court must identify the closest analogies to the ATCA from both state and federal law and determine which one presents the best analogy. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1547 (N.D. Cal. 1987); *see also Iwanowa*, 67 F. Supp. 2d at 462-63 (citing *Forti*); *Xuncax v. Gramajo*, 886 F. Supp. 162, 190-93 (D. Mass. 1995) (same). The Korean and Chinese plaintiffs have brought their claims under the ATCA in an effort to obtain compensation from defendants for the damages caused by requiring them to engage in forced and slave labor during

the Second World War. This effort closely resembles a personal injury suit, such as for false imprisonment, and thus the most analogous state laws are those providing personal injury causes of action for intentional torts. In California, such tort actions have a one year statute of limitations. *See* Cal. Civil Proc. Code § 340(3).

Locating the closest federal statute is a relatively straightforward task. In 1991, Congress enacted the Torture Victim Protection Act (TVPA) as a statutory note to the ATCA. *See* 28 U.S.C. § 1350, notes. The TVPA provides that any "individual who, under actual or apparent authority, or color of law, of any foreign nation * * * subjects an individual to torture * * * [or] extrajudicial killing shall, in a civil action, be liable for damages * * *." *Id.*, note § 2(a). Given the similarity between forced labor and torture—both of which, as noted above, the Ninth Circuit considers to be violations of *jus cogens* norms—combined with Congress' decision to incorporate the TVPA into the notes of the ATCA, the court concludes that the TVPA serves as the closest federal statute to the ATCA. The TVPA provides a ten year limitations period. 28 U.S.C. § 1350, note § 2(c).

In light of the fact that the TVPA is directed at conduct committed in foreign nations that violates customary international law (torture and extrajudicial killing), much like a cause of action under the ATCA would address, the court concludes that the TVPA is a much better analogy than state law. Indeed, the courts that have evaluated what limitations period should apply under the ATCA since the TVPA was enacted have reached the same conclusion. *See, e.g.*, *Iwanowa*, 67 F. Supp. 2d at 462; *Cabiri v. Assasie-Gyimah*,

921 F. Supp. 1189, 1195-96 (S.D. N.Y. 1996); *Xuncax*, 886 F. Supp. at 192-93. Accordingly, the court concludes that the TVPA's ten year statute of limitations applies to the claims of the Korean and Chinese plaintiffs.

Federal law determines when a cause of action accrues and the statute of limitations begins to run. *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999). Under federal law, a plaintiff's cause of action accrues "when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Id.* Under this standard, the Korean and Chinese plaintiffs were aware of their injuries no later than when the war ended in 1945. These cases were initiated, however, in 1999 and 2000, over 50 years later and well outside the ten year limitations period.

Intertwined in the analysis of the timeliness of an action, of course, is whether the applicable statute of limitations has been tolled. When borrowing the limitations period from another federal statute, federal, rather than state, tolling doctrines apply. *See Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1199 (9th Cir. 1988) (citing *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975)); *see also* Wright & Miller, 19 *Federal Practice and Procedure* § 4519 at 627-33 (West Publishing Co. 1996). As the Ninth Circuit has pointed out, the Senate Report on the TVPA states that the ten-year limitations period is subject to equitable tolling. *Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996) (*Marcos III*) (citing S. Rep. No. 249, 102d Cong., 1st Sess., at 11 (1991)). Such tolling may be triggered if the defendant has engaged in wrongful conduct, or extraordinary circumstances occurred outside of the plaintiff's control, which prevented

the plaintiff from asserting his claim during the limitations period. *Id.* At bottom, however, "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984); *see also Lehman v. United States*, 154 F.3d 1010, 1016 (9th Cir. 1998), cert. denied, 526 U.S. 1040 (1999) ("Equitable tolling * * * is not available to avoid the consequences of one's own negligence.").

None of the allegations in the Korean and Chinese plaintiffs' complaints suggest that they could not have attempted to bring these claims sooner. To be sure, the Ninth Circuit only formally recognized a right of action under the ATCA in 1994. *See Marcos II*, 25 F.3d at 1475. But the statute has been in force since the 18th century and several courts found it to provide a cause of action much earlier than the Ninth Circuit. *See, e.g., Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857, 865 (D. Md. 1961) ("The wrongful acts were therefore committed in violation of the law of nations. And since they caused direct and special injury to the plaintiff, he may bring an action in tort therefor."); *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987).

The Korean and Chinese plaintiffs do not assert reasons why their claims could not have been brought under the ATCA within ten years of the war's end. Their reference to the Japanese government's alleged suppression of similar claims brought by Korean forced laborers in Japan shortly after the war does not explain why the same claims could not have been alleged in a United States court. *See* Pl. Opp.

Br. (Doc. # 254) at 26 n.44. Moreover, to the extent the Korean and Chinese plaintiffs contend that they were not aware of the opportunity to bring these claims in the United States, "mere ignorance of the cause of action does not, in itself, toll the statute." *Volk, LA v. DA Davidson & Co.*, 816 F.2d 1406, 1416 (9th Cir. 1987).

The court concludes, therefore, that the ten year limitations period on the Korean and Chinese plaintiffs' international law claims under the ATCA has not tolled. Accordingly, to the extent such claims could have been asserted against defendants for their forced labor practices during the Second World War, they are barred by the statute of limitations.

B

As previously noted, the Korean and Chinese plaintiffs also seek compensation and restitution under other California state laws. Specifically, among the seven complaints the Korean and Chinese plaintiffs allege the following state law claims: (1) false imprisonment; (2) assault and battery; (3) conversion; (4) unjust enrichment and quantum meruit; (5) constructive trust; (6) accounting; (7) the Unfair Competition Act (UCA), Cal. Bus. & Prof. Code §§ 17200 et seq.; and (8) violations of Article 1 of the California Constitution and Penal Code § 181, which prohibit involuntary servitude. To the extent the conduct of defendants during the Second World War would have been actionable under any of these California laws, they are also barred by the applicable statutes of limitations.

Appendix B

It has long been established that a federal court addressing state law claims generally "utilizes its own state's statute of limitations." *Forsyth v. Cessna Aircraft Co.*, 520 F.2d 608, 613 (9th Cir. 1975); *see also* Restatement Second, Conflict of Laws § 142. Because the forced labor underlying these claims occurred in China and Japan, a conflict of law question arises for which the court must look to the laws of the forum state, including its choice of law rules, to determine which statutes of limitations to apply. *See Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 109-10 (1945); *Santana v. Holiday Inns, Inc.*, 686 F.2d 736, 737-38 (9th Cir. 1982). California employs a "governmental interest" approach to choice of law questions, essentially requiring an analysis regarding the potential conflict between the statute of limitations in California and those applicable in China and Japan and, if a conflict exists, an assessment of the competing interests of the forums. *See In re Yagman*, 796 F.2d 1165, 1170 (9th Cir. 1982). Such analysis is not necessary here, however, because the statutes of limitations from all three forums are significantly shorter than the age of these claims.

- Under California law, the longest applicable statute of limitations, which relates to the UCA, is just four years. *See* Cal. Bus. & Prof. Code § 17208. All of the other state law claims asserted by the Korean and Chinese plaintiffs trigger a limitations period under California law between one to three years from the date the claims accrued. *See* Cal. CCP §§ 338, 339, 340. The Civil Code of Japan provides that claims lapse if not exercised within ten years. *See* The Civil Code of Japan, art. 167 at FA 29 (Exhibits in Support of Motion to Dismiss (Doc. # 212), Exh. Z). Under the law of

China, the longest applicable statute of limitations is two years for civil suits. *See* Civil Law of China, arts. 135-37 (Exhibits in Support of Motion to Dismiss (Doc. # 212), Exh. AA).

The Korean and Chinese plaintiffs do not contend that these statutes of limitations have been tolled. In fact, they appear to concede the futility of these state law claims by arguing exclusively that their claims are valid under section 354.6 and the ATCA. In support of this assessment, the court notes that the people of the state of California, through the office of the Attorney General, states that "[a]bsent [section 354.6, the plaintiffs] would be without a remedy * * *." Amicus Curiae Brief of the People of the State of California (Doc. # 101) at 1. Further buttressing this conclusion is the fact that district courts in Japan addressing similar claims have uniformly dismissed such actions, in part, because the applicable statutes of limitations have run. *See* Appeal to International Labour Organization Regarding Violation of Convention No. 29 by Japan During Wartime (Pl. Appendix (Doc. # 14), Exh. I) at 3.

To the extent the Korean and Chinese plaintiffs' complaints are based on these California statutes, therefore, the court concludes that they are time-barred.

IV

For the foregoing reasons, the motions to dismiss and/or for judgment on the pleadings are GRANTED with respect to the actions involving the Korean and Chinese plaintiffs. The clerk shall enter judgment in the above-captioned cases,

terminate all motions and close the files.

IT IS SO ORDERED.

s/ Vaughn R. Walker
VAUGHN R. WALKER
United States District Judge

(2) (3)

Supreme Court, U.S.
FILED
AUG 4 - 2003
OFFICE OF THE CLERK

Nos. 02-1773, 02-1778

IN THE

Supreme Court of the United States

DO GEUN OH, ET AL.,

Petitioners,

VS.

MITSUI & CO., LTD., ET AL.,

Respondents.

ZHENHUAN MA, ET AL.,

Petitioners,

VS.

KAJIMA CORPORATION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
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Question Presented

Whether the Ninth Circuit correctly held that a 1999 California statute purporting to create a private right of action on behalf of "Second World War forced labor victim[s]" is preempted under the foreign affairs doctrine as recently explicated by this Court's decision in *American Insurance Association v. Garamendi*, where the United States' foreign policy – exemplified in its drafting, negotiation and ratification of the multilateral Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169 – has already resolved the war and all war-related claims as a matter of United States law, including consigning such claims by Korean and Chinese nationals to diplomatic resolution.

Rule 29.6 Corporate Disclosure Statement

Ishikawajima-Harima Heavy Industries Co., Ltd. is a Japanese public company and is listed on the Tokyo Stock Exchange. Ishikawajima-Harima Heavy Industries Co., Ltd. has no parent company, and no publicly held company owns 10% or more of its stock. IHI, Inc. is a wholly owned subsidiary of Ishikawajima-Harima Heavy Industries Co., Ltd.

Kajima Construction Services, Inc. is a wholly owned subsidiary of Kajima International, Inc., which is a wholly owned subsidiary of Kajima USA, Inc., which is a wholly owned subsidiary of Kajima Corporation, a Japanese corporation. Kajima Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

Kajima Development Corporation is a wholly owned subsidiary of Kajima Real Estate Development, Inc., which is a wholly owned subsidiary of Kajima USA, Inc., which is a wholly owned subsidiary of Kajima Corporation.

Kajima Engineering and Construction, Inc. is a wholly owned subsidiary of Kajima Corporation.

Kajima International, Inc. is a wholly owned subsidiary of Kajima USA, Inc., which is a wholly owned subsidiary of Kajima Corporation.

Kajima USA, Inc. is a wholly owned subsidiary of Kajima Corporation.

Mitsubishi Corporation is a public company listed on the Tokyo Stock Exchange. No publicly held company owns 10% or more of the outstanding stock of Mitsubishi Corporation. Mitsubishi International Corporation is a wholly owned subsidiary of Mitsubishi Corporation.

Mitsubishi Heavy Industries, Ltd. is a Japanese public company and is listed on the Tokyo Stock Exchange. No

publicly held company owns 10% or more of its stock. Mitsubishi Heavy Industries America, Inc. is a wholly owned subsidiary of Mitsubishi Heavy Industries, Ltd.

Mitsubishi Materials Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Mitsubishi Materials U.S.A. Corporation's parent corporation is Mitsubishi Materials Corporation, and no other publicly held company owns 10% or more of Mitsubishi Material U.S.A. Corporation's stock.

Mitsui & Co., Ltd. is a public company listed on the Tokyo Stock Exchange. No publicly held company owns 10% or more of the outstanding stock of Mitsui & Co., Ltd. Mitsui & Co. (U.S.A.), Inc. is a wholly owned subsidiary of Mitsui & Co., Ltd.

Mitsui Engineering & Shipbuilding Co., Ltd. has no parent corporation, and no publicly traded company owns 10% or more of its stock.

Mitsui Mining Co., Ltd. is a Japanese public company and is listed on the Tokyo Stock Exchange. No publicly held company owns 10% or more of its stock. Mitsui Mining U.S.A., Inc. is a wholly owned subsidiary of Mitsui Mining Co., Ltd.

Nippon Steel Corporation is a Japanese public company, listed on the Tokyo Stock Exchange. No publicly held company owns 10% or more of its stock. Nippon Steel U.S.A., Inc. is a wholly owned subsidiary of Nippon Steel Corporation.

Paceco Corp.'s parent corporation is Mitsui Engineering & Shipbuilding Co., Ltd., and Mitsui & Co., Ltd. owns over 10% of its stock.

Showa Denko America, Inc. is a wholly owned subsidiary of Showa Denko K.K. Showa Denko K.K. is a Japanese public company, listed on the Tokyo Stock Exchange. No

publicly held company owns more than 10% or more of Showa Denko K.K.'s stock.

Sumitomo Heavy Industries, Ltd. is a Japanese public company and is listed on the Tokyo Stock Exchange. No publicly held company owns 10% or more of its stock. Sumitomo Heavy Industries (U.S.A.), Inc. is a wholly owned subsidiary of Sumitomo Heavy Industries, Ltd.

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IN THE

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DO GUEN OH, ET AL.,

Petitioners,

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MITSUI & CO., LTD., ET AL.,

Respondents.

ZHENHUAN MA, ET AL.,

Petitioners,

v.

KAJIMA CORPORATION, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

This Court should deny the *Oh* and *Ma* petitions for a writ of certiorari.[1] The judgment of the U.S. Court of Appeals for the Ninth Circuit correctly holds that a California statute creating a cause of action for conduct of Japanese nationals in Asia during World War II is preempted

[1] Two certiorari petitions were filed by petitioners in seven cases. Petition 02-1773 (*Oh*) includes *Kim v. Ishikawajima Harima Heavy Indus., Ltd., et al.* (01-17197); *Sin v. Mitsui & Co., Ltd., et al.* (01-17203); *Choe v. Nippon Steel Corp., et al.* (01-17211); and *Oh, et al., v. Mitsui & Co. Ltd., et al.* (01-17251). Petition 02-1778 (*Ma*) includes *Ma v. Kajima Corp., et al.* (01-17201); *Sung v. Mitsubishi Corp., et al.* (01-17207); and *Su, et al., v. Mitsubishi Corp., et al.* (01-17243).

by the core federal power to make and resolve war, which the United States "already exercised" when it "resolve[d] the war, including claims arising out of it," in the multilateral Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169 ("Allied Treaty" or "Treaty"). *See* Appendix to Petition for Certiorari of the *Oh* petitioners ("*Oh* Pet. App.") at 24a, 27a. The Ninth Circuit's ruling is supported by the *amicus curiae* position of the United States below.[2]

The *Oh* and *Ma* petitions rely on a decision of a different Ninth Circuit panel, which this Court reversed in *American Insurance Ass'n v. Garamendi*, 123 S. Ct. 2374 (2003) just three weeks after the petitions were filed. *Garamendi* held another World War II-related California statute to be preempted under the foreign affairs doctrine by virtue of Executive agreements aimed at resolving claims arising out of World War II in Europe.

Here the federal interest – the exercise of the war powers through a peace treaty – is even stronger than in *Garamendi*, and is in direct conflict with the state statute, whose only purpose is "to redress wrongs committed in the course of the Second World War." *Oh* Pet. App. at 23a. As the Ninth Circuit recognized in distinguishing its own earlier decision, which was subsequently reversed in *Garamendi*, these factors make this a clear case for foreign affairs preemption. No conflict exists among the U.S. Courts of Appeal or state courts of last resort with respect to the foreign affairs preemption issue raised by the petitions.

The statute, section 354.6 of the California Code of Civil Procedure, is also invalid for other reasons not reached by the Ninth Circuit. Among these are California's lack of legislative jurisdiction to create a cause of action for events

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[2] The Brief for *Amicus Curiae* the United States of America, filed with the Ninth Circuit on June 6, 2002, appears at respondents' Appendix F.

that occurred beyond its borders, on behalf of persons such as petitioners who, at the time of the events, were all foreign nationals having no ties to California or the United States. Petitioners had no right to sue in U.S. courts a half century ago and they have none now. The petitions should be denied.

Opinions Below

The pertinent opinion of the Court of Appeals is that reported at 324 F.3d 692 (9th Cir. 2003) and not, as the *Oh* petition asserts, the amended and superseded opinion reported at 317 F.3d 1005 (9th Cir. 2003). *Oh* Pet. at 1. The version of the opinion attached to the *Oh* petition is, however, the correct one.

Pertinent Constitutional Provisions, Treaties and Statutes

Constitution of the United States

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . .
>
> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; . . . .

U.S. Const. art. II, § 2, cls. 1, 2.

> The Congress shall have Power To . . . provide for the common Defense . . .;
>
> To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
>
> To raise and support Armies . . .;
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces . . . .

U.S. Const. art. I, § 8, cls. 1, 10-14.

> No State shall enter into any Treaty, Alliance, or Confederation; [or] grant Letters of Marque and Reprisal . . . .
>
> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with . . . a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

U.S. Const. art. I, § 10, cls. 1, 3.

Treaties

The Allied Treaty appears at respondents' Appendix A.

The Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation, Japan-Republic of Korea, June 22, 1965, 583 U.N.T.S. 258 ("Japan-Korea Treaty"), appears at respondents' Appendix B.

The Treaty of Peace Between China and Japan, Apr. 28, 1952, 38 U.N.T.S. 1858 ("Japan-ROC Treaty"), appears at respondents' Appendix C.

The Joint Communiqué of the Government of Japan and the Government of the People's Republic of China, Sept. 29,

1972 ("Joint Communiqué"), appears at respondents' Appendix D.

The Treaty of Peace and Friendship Between Japan and the People's Republic of China, Aug. 18, 1978 ("Japan-PRC Treaty"), appears at respondents' Appendix E.

Statutes

Section 354.6 of the California Code of Civil Procedure is set forth in full in the Ninth Circuit's opinion. *See Oh* Pet. App. at 10a-12a.

Statement of the Case

Petitioners and the classes they claim to represent[3] were all foreign nationals and nonresidents of the United States at all relevant times.[4] All rely on section 354.6 of the California Code of Civil Procedure, enacted in 1999, which creates a cause of action for persons allegedly forced to labor during World War II by, or in areas occupied by, "the Nazi

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[3] No class has been certified; putative class members allegedly number in the "thousands" or "hundreds of thousands." ER 7 (*Kim* Complaint); ER 39 (*Choe* Complaint); ER 94; (*Sin* Complaint); ER 120 (*Oh* Complaint); ER 75 (*Sung* Complaint); ER 151 (*Su* Complaint); ER 245 (*Ma* Complaint).

"ER" refers to the Excerpts of Record filed jointly in the U.S. Court of Appeals for the Ninth Circuit by the *Oh* and *Ma* groups of petitioners. "SER" refers to the Supplemental Excerpts of Record filed jointly in the Ninth Circuit in the *Oh* and *Ma* cases by respondents.

[4] Although the *Oh* petitioners generally are referred to as "Koreans" in this brief, they actually were subjects of Japan at all relevant times; Japan annexed Korea in 1910, and Korea became independent only after World War II. ER 11 (*Kim* Complaint); ER 43 (*Choe* Complaint); ER 123 (*Oh* Complaint). The *Ma* petitioners were Chinese nationals at all relevant times. ER 68-69 (*Sung* Complaint); ER 143-45 (*Su* Complaint); ER 237-39 (*Ma* Complaint).

regime or its allies," which, petitioners allege, include Japan.[5]

A. Background

Because petitioners' claims are bound up in the prosecution and conclusion of World War II in Asia, it is essential (as the courts below recognized) to understand the foreign policy that the United States formulated, incorporated into the Treaty and persuaded 47 other Allied Nations to adopt. Of special importance are the Treaty's requirements that claims of Korean nationals be resolved, not by litigation, but through "special arrangements" between the governments of Japan and Korea, art. 4(a) (which eventuated in the Japan-Korea treaty), and that Japan conclude treaties with Korea and China on "substantially the same terms" as the Allied Treaty, including the latter's resolution of war-related claims, art. 26 (which eventuated, in the case of China, in the Japan-ROC Treaty, the Joint Communiqué and the Japan-PRC Treaty). *See* App. A at 3a, 19a-20a.

The United States viewed a "free, prosperous and democratic Japan" as "an important stabilizing influence in the Far East" in the face of "mount[ing] international tensions" in that region. SER 545-46 (S. Exec. Rep. No. 82-2). Convinced that peace would be jeopardized "if the treaty validated, or kept contingently alive, monetary reparation claims against Japan," the United States convinced its Allies that "it is our duty not to dwell on the past, but to turn our eyes toward the future." SER 304, 309 (Record of Proceedings of the Conference for the Conclusion

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[5] Respondents are Japanese companies and certain of their contemporary U.S. subsidiaries. The latter are sued not for their own acts, but for the alleged acts of their Japanese parents – in most cases for acts of purported *predecessors* of their parents. *See, e.g.*, ER 36 (*Choe* Complaint); ER 118 (*Oh* Complaint); ER 71 (*Sung* Complaint); ER 147-48 (*Su* Complaint); ER 239-40 (*Ma* Complaint).

and Signature of the Treaty of Peace with Japan (1951) ("Proceedings")).

The Treaty's reparations provisions were premised on the recognition that it "would have been a short sighted policy and would certainly have laid the foundation of a lasting resentment" to leave Japan and its nationals open to future war-related claims. SER 311 (Proceedings). Consistent with the well-settled principle that "*reparations for war losses is a . . . matter to be settled between governments*" and "it is the . . . *responsibility of each government to provide such compensation for persons under its protection as that government deems fair and equitable* . . . out of reparations that may be received from Japan or from other sources," SER 556 (S. Exec. Rep. No. 82-2), the United States negotiated and crafted a Treaty that conclusively provided for resolution of all war-related claims.[6]

Allied signatories of the Treaty were accorded specified reparations and waived all further claims of their own and their nationals against Japan and its nationals (and vice versa). App. A at 10a-17a (arts. 14-19); *see generally* Brief of Respondents in Opposition to the petitions for a writ of certiorari filed in *Tenney, et al., v. Mitsui & Co., Ltd., et al.* (02-1776) and *Saldajeno, et al., v. Ishihara Sangyo Kaisha Ltd., et al.* (02-1784) ("Signatory Brief"). The funds to pay these reparations came principally from assets of Japanese businesses and individuals located in Allied and neutral nations. App. A at 10a-15a (arts. 14(a), 16); *see generally* Signatory Brief.

Although Korea could not sign the Treaty "because [it] was never at war with Japan," the Treaty "in many ways, treat[ed] Korea like an Allied Power," "obtain[ing] for Korea Japan's formal recognition of Korea's independence, and

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[6] Emphasis in quotations is added throughout this brief, unless otherwise specified.

Japan's consent to the vesting in the Republic of Korea, of the very considerable Japanese property in Korea," and placing Korea "on a parity with the Allied powers as regards . . . commercial arrangements." SER 305 (Proceedings).

Because of disagreement among the Allies as to which "China" should sign the Treaty – Nationalist or Communist – neither did. SER 305 (Proceedings). Nevertheless, "[t]he Treaty preserve[d], in full, the rights of China as one of the Allied Victors," by, *inter alia*, awarding China all Japanese property in Chinese territory. *Id.* at SER 306. At the same time, the United States insisted that China's nonparticipation not defeat the policy of achieving final resolution of all war claims; "it would . . . be *wrong, cruel and stupid to penalize Japan* because there is civil war in China and international disagreement regarding China." *Id.* at SER 305.

While acknowledging that nonsignatory nations, particularly Korea and China, had suffered enormously from "Japanese aggression," SER 304, 305 (Proceedings), the United States concluded that requiring reparations from Japan "in any proportion commensurate with the claims of the injured countries and their nationals" would be "contrary to the basic purposes and policy of the free nations, the Allied Powers, *and the United States in particular*." SER 555 (S. Exec. Rep. No. 82-2). Peace "would be impossible if the Treaty kept alive the right[s] of the [injured countries] to demand monetary reparations payments." SER 424 (Memo, Sec'y of State to President, Aug. 7, 1951). Accordingly, article 26 of the Treaty obligated Japan to conclude separate treaties with Korea and China "on the same or substantially the same terms" as the Allied Treaty, SER 289-90, including the latter's reparations provisions. *See* App. A at 10a-13a (art. 14); *see generally* Signatory Brief. Article 4(a) also directed that "claims. . . of [Korea] and [its] residents against Japan and its nationals, *shall be the subject of special arrangements between Japan and*

[Korea]," App. A at 3a, thus mandating that Korean nationals' claims "be resolved through inter-governmental agreements rather than litigation." App. F at 54a.

Faithful to the Allied Treaty, Japan negotiated the Korea-Japan Treaty and, consistent with U.S. foreign policy, three agreements with China: one with the Republic of China (the Japan-ROC Treaty) and, later, two with the People's Republic of China (the Joint Communiqué and the Japan-PRC Treaty). As discussed in sections I.B.2. and II.B. *infra*, these treaties also address reparations and independently preclude adjudication of petitioners' claims.

B. Petitioners' Allegations

Petitioners admittedly have never had any contact with California, except for a handful who emigrated after World War II. None of the conduct underlying their claims occurred in California, or even in the United States. Petitioners allege that their forced labor was in furtherance of the Japanese war effort.[7] Several of the complaints' details attest to the Japanese Government's deep involvement in the forced labor regime, *e.g.*, through laws and government directives requiring companies to use forced labor to achieve Japan's war aims,[8] and through the use of police and other government agencies to dragoon forced laborers.[9] Some

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[7] *See, e.g.*, ER 34 ("To assist *in the war effort* the Japanese government directed that Korean Nationals be forcibly deported and put to work by Japanese industry."); *see also* ER 36 ¶ 10, 52 ¶ 60; ER 2, 4; ER 67; ER 93; ER 123; ER 142; ER 235-36.

[8] *See, e.g.*, ER 43-44 ("National General Mobilization Law directed . . . authorities to 'draft Imperial subjects and make them serve the purposes of general mobilization.'"); ER 12 ("[T]he Japanese Cabinet . . . prescribed . . . numbers of Koreans . . . deported for forced and slave labor and detailed allocations [of laborers] to particular industries.").

[9] *See, e.g.*, ER 98 ("[Plaintiff] was raided by a policeman and an officer of the [regional] office while asleep in [his] home, . . . handcuffed [,] . . . taken to a gathering place . . . , and was transported to Japan forcibly."); ER 12 ("Japanese Welfare Ministry issued a directive

(continued ...)

complaints allege that respondents' predecessors "turned over" petitioners' wages to the Japanese Government, which never remitted the money to petitioners.[10]

C. Proceedings in the District Court

The Judicial Panel on Multidistrict Litigation consolidated petitioners' cases in the U.S. District Court for the Northern District of California, along with 21 others based on section 354.6. SER 16-23, 265-67, 578. That court dismissed all 28 cases, holding section 354.6 unconstitutional "because it infringes on the exclusive foreign affairs power of the United States."[11] *Oh* Pet. App. at 52a, 73a.

The District Court had the benefit of a Statement of Interest of the United States, explaining the Treaty's negotiating and legislative history, U.S. foreign policy underlying it, and the Treaty's status as the cornerstone of U.S. Far Eastern policy over the last half century. The court was also provided with a *Note Verbale* from the Government of Japan to the United States. Both governments explained that section 354.6 would frustrate the operation of the Treaty – which contemplated resolution of all war claims by "state-to-state negotiations" – and would "jeopardize relations between the United States and Japan and Japan and its Asian neighbors." SER 517, 520 (U.S. Statement of Interest); *see* SER 525 (*Note Verbale*).

(... continued)
that confirmed that the forcible deportation of Koreans was systematic and calculated.").

[10] *See* ER 10; ER 42; ER 97.

[11] The District Court also ruled that petitioners' other claims were all time-barred. *Oh* Pet. App. at 82a, 84a. That ruling, affirmed by the Ninth Circuit, *id.* at 32a-35a, is not challenged in the certiorari petitions.

D. The Court of Appeals Decision

The Ninth Circuit affirmed the District Court's judgments in all 28 consolidated cases.[12] Like the District Court, the Ninth Circuit had the benefit of the views of the United States, which supplemented its Statement of Interest with an *amicus curiae* brief and presented oral argument on the Treaty and U.S. foreign policy issues.

In its analysis, the panel expressly distinguished an earlier decision of a different panel – later reversed by this Court in *Garamendi* – in *Gerling Global Reins. Corp. v. Low*, 240 F.3d 739 (9th Cir. 2001). *Low* involved another World War II statute enacted by California, the Holocaust Victim Insurance Relief Act, Cal. Ins. Code §§ 13800-13807 ("HVIRA"). HVIRA, unlike Section 354.6, did not create a private right of action; rather, it required insurers doing business in California to provide disclosure about policies sold to persons in Europe, which were in effect between 1920 and 1945. The panel deciding the present cases recognized that the basis for preemption is much stronger for section 354.6 than for HVIRA. While section 354.6 has no purpose except "to provide a monetary remedy for decades-old wartime wrongs," *Oh* Pet. App. at 31a, HVIRA was a "forward-looking regulatory statute" that "merely" required disclosure and at least purported to safeguard contemporary consumer interests. *Id.*

In assessing where the line between federal and state power is to be drawn in the context of a law to remedy war-related injuries, the Ninth Circuit considered that, of the eleven clauses of the Constitution dealing with the foreign affairs powers of the President and Congress, seven

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[12] In addition, the Ninth Circuit affirmed dismissal of *Deutsch* v. *Turner Corp.*, No. CV 00-4405 SVW (AJWX), 2000 WL 33957691 (C.D. Cal. Aug. 25, 2000), which alleged World War II wrongs by German, not Japanese corporations. No certiorari petition was filed in *Deutsch*.

enumerate war powers, including "settling war." *Oh* Pet. App. at 21a. Conversely, "[m]ost of the Constitution's express limitations on States' foreign affairs powers also concern war." *Id.* The court found that the power "to resolve war, including the power to establish the procedure for resolving war claims" is "part of the inner core" of the "foreign relations power that is denied to the states." *Oh* Pet. App. at 20a-21a. It also noted that the state statute struck down by this Court in *Zschernig v. Miller*, 389 U.S. 429 (1968), although not by its terms war-related, "was seen by a Court operating at the height of the Cold War as a potential provocation to foreign powers." *Oh* Pet. App. at 21a-22a.

The Ninth Circuit went on to note that the federal government had "already exercised its own exclusive authority to resolve" World War II, "including claims arising out of it," by the ratification of the Allied Treaty. *Oh* Pet. App. at 24a, 27a. As the parties agreed, that resolution neither created "a private right of action against Japan or its nationals" nor authorized "states of the United States to create such a right." *Oh* Pet. App. at 27a. Because section 354.6 would "modify" that resolution, the court held that the statute was preempted. *Oh* Pet. App. at 27a-28a & n.14. This holding did not depend on the nationality of any particular plaintiff who might invoke section 354.6 in a U.S. court; accordingly, it was "immaterial" that petitioners were citizens of nations that did not sign the Treaty. *Oh* Pet. App. at 28a n.14.

Petitioners requested rehearing and rehearing en banc, which were unanimously denied on March 6, 2003. No active judge requested a vote on rehearing en banc, although two of the *Low* panel members are active judges. *Oh* Pet. App. at 41a. Nevertheless, the Ninth Circuit held issuance of its mandate pending this Court's decision in *Garamendi*.

After this Court decided *Garamendi* on June 23, 2003, the *Ma* petitioners asked the Ninth Circuit to reconsider its

decision. The Ninth Circuit denied the request for reconsideration and issued its mandate on July 30, 2003.

Argument

I. Because the Ninth Circuit's Decision Accords with *Garamendi*, the Petitions Should Be Denied

The Ninth Circuit's decision is fully consistent with *Garamendi* – indeed, had the Ninth Circuit not invalidated section 354.6, *Garamendi* would require reversal. Preemption is required under either, or both, preemption theories discussed in *Garamendi* – the "field" theory *Garamendi* identified as the basis of the majority opinion in *Zschernig* and the "conflict" theory of Justice Harlan's *Zschernig* concurrence. *Garamendi,* 123 S. Ct. at 2388-89. As *Garamendi* explained, under the "field" approach, *all* "state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the law, and hence *without any showing of conflict*." *Id.* at 2388 (citing *Zschernig*, 389 U.S. at 441; *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941); *United States v. Belmont,* 301 U.S. 324, 331 (1937); and *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-19 (1936)). "Conflict" preemption requires an actual conflict between state law and a federal foreign policy interest. *Garamendi*, 123 S. Ct. at 2389.

Garamendi found it unnecessary to make a "categorical choice" between the two theories; there was a "sufficiently clear conflict" between the federal policy and state law in that case to result in preemption. *Id.* at 2389-90. The Court further observed that no such choice may be necessary in other cases, or, indeed ever, for the two theories "can be seen as complementary." *Id.* at 2389 n.11. Thus, "field preemption might be the appropriate doctrine" where a state "take[s] a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," while "it might make good sense to require a

conflict" where "a state has acted within" its "'traditional competence,' but in a way that affects foreign relations." *Id.* (quoting *Zschernig*, 389 U.S. at 459 (Harlan, J., concurring)).

The Ninth Circuit also did not explicitly choose one preemption theory, nor did it need to.[13] As shown below, either theory could apply here and, under either analysis, section 354.6 is invalid.

A. As Applied to Respondents, Section 354.6 Is Preempted Under the "Field" Theory Described in *Garamendi*

1. This Case Presents Precisely the Circumstances That Make Field Preemption "the [A]ppropriate [D]octrine" Under *Garamendi*

Garamendi teaches that field preemption may be "the appropriate doctrine" where a state acts in the area "of foreign policy with no serious claim to be addressing a traditional state responsibility." 123 S. Ct. at 2389 n.11. Here California has fashioned its own war reparations cause of action and can make no "serious claim" that it is addressing a "traditional state responsibility" – not even one with the "tangential relation to present-day" regulatory objectives asserted (albeit unsuccessfully) to justify the statute struck down in *Garamendi*. *Id.* at 2394.[14]

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[13] This Court has previously held that the "categories of preemption are not 'rigidly distinct.'" *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 373 n.6 (2000) (quoting *English* v. *Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)). "Indeed, field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation." *English*, 496 U.S. at 79 n.5.

[14] In seeking rehearing of *Garamendi*, even California has stressed that "HVIRA is simply a disclosure statute that does not force the payment of any claim" and that the conduct that prompted it is the "*present* refusal of companies to disclose," *Am. Ins. Ass'n* v. *Garamendi*,

(continued ...)

As the Ninth Circuit correctly recognized, section 354.6 permits suit "*only*" by "'*Second World War* slave labor victims'" and "'*Second World War* forced labor victims.'" *Oh* Pet. App. at 23a (quoting § 354.6(b)). The "wrong-doers under the statute" – "'the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies or sympathizers'" – were, "by definition, wartime enemies of the United States," or at least "were operating in enemy territory . . . with the consent and for the benefit of our wartime enemy." *Id.* (quoting § 354.6(a)(1), (2)). By enacting section 354.6, California plainly sought "to create its own resolution to a major issue arising out of the war – a remedy for wartime acts that California's legislature believed had never been fairly resolved." *Id.*

Since this country's founding, the law has been clear: resolution of war claims is for the federal government to address through treaties or other state-to-state agreements. *Ware v. Hylton*, 3 U.S. (Dall.) 199, 229-30 (1796) (compensation for losses sustained "during [a] war . . . [may] only be provided for by the treaty of peace" because "a treaty of peace abolishes the subject of the war . . . , [and a]ll violences, injuries or damages sustained by the government or people of either [belligerent] during the war, are buried in oblivion . . . by the very treaty of peace"); *see also Stewart v. Kahn*, 78 U.S. 493, 506-07 (1870) (states cannot interfere with federal war- and peace-making powers, which include the power to "remedy the evils which have arisen from [war's] rise and progress"). This principle is grounded, as the Ninth Circuit recognized, in the Constitution's textual

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No. 02-722, Pet. Reh. at 7 – wholly unlike section 354.6. *See also Garamendi*, 123 S. Ct. at 2397 (Ginsberg, J., dissenting) (noting that "statutory provisions enabling the litigation of Holocaust era insurance claims" were "not at issue" there).

commitment of war powers to the federal government, while withholding them from the states.[15]

The Ninth Circuit's conclusion that the "power to establish the procedure for resolving war claims" is "part of the inner core" of the "foreign relations power that is denied to the states," *Oh* Pet. App. at 20a-21a, seems to anticipate *Garamendi's* observation that "[v]indicating victims injured by acts and omissions of enemy corporations in wartime is . . . within the traditional subject matter of foreign policy in which the national, not state, interests are overriding." *Garamendi*, 123 S. Ct. at 2390. Thus California's attempt to provide its own war reparations law is surely subject to preemption under *Garamendi.*

2. Field Preemption Is Particularly Appropriate Where, as Here, the Federal Government Has Exercised Its Treaty Powers

Under the field preemption theory of the *Zschernig* majority opinion, state action may be preempted "*even absent any affirmative federal activity*" in the field. *Garamendi,* 123 S. Ct. at 2388; *see also Zschernig,* 389 U.S. at 441 (preemption found in the "*absence of* a treaty," statute or executive agreement). Here, unlike *Zschernig*, there has been intense federal activity in the very area of foreign affairs in which the California statute purports to operate. As the Ninth Circuit recognized, "the United States has *already exercised* its own exclusive authority to resolve the war, including claims arising out of it." *Oh* Pet. App. at 24a, 27a.

The fact that the United States' exercise of its foreign affairs authority culminated in the Treaty – as opposed to some other "affirmative federal activity" – provides additional support for finding preemption here. Whatever

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[15] *See also* The Federalist No. 3 ("[N]ot only fewer just causes of war will be given by the national government, but it will also be more in their power to accommodate *and settle them amicably*.").

may be said regarding executive agreements or other exercises of foreign affairs powers, the federal treaty power "enjoy[s] . . . textual detail" in the Constitution. *Garamendi*, 123 S. Ct. at 2386; *see* U.S. Const. art. II, § 2, cl. 2. Indeed, the power to make treaties is expressly *denied* to the states. *Id.* art. I, § 10, cl. 1. Furthermore, federal law embodied in a treaty reflects the consensus of Congress and the Executive regarding foreign policy. *Cf. Crosby*, 530 U.S. at 375 (noting that "'[w]hen the President acts [in foreign affairs] pursuant to an . . . authorization from Congress, his authority is at its maximum'") (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)); *Garamendi*, 123 S. Ct. at 2400 n.4 (Ginsburg, J., dissenting) (criticizing the majority's reliance on *Crosby* because "*Crosby* was a *statutory* preemption case"). Here, both the Executive and Congress have acted to occupy the field of war reparations against Japan, through a longstanding policy embodied in the Treaty, leaving California no possible ambit to enact section 354.6.

B. Particularly As Applied to Respondents, Section 354.6 Is Equally Preempted Under the "Conflict" Theory Described in *Garamendi*

Even if section 354.6 could somehow be viewed as addressing issues "within areas of . . . traditional state responsibility," so as to warrant application of the "conflict" preemption standard articulated in *Garamendi*, the California statute would still be preempted if applied to respondents. As articulated in *Garamendi*, the "clarity or substantiality" of a conflict "var[ies] with the strength or the traditional importance of the state concern asserted," *id.* at 2389 n.11, and, as appropriate, "the strength of the federal foreign policy interest." *Id.* Here, California's interest is extraordinarily weak, the conflict is acute, and the federal interest is overwhelming.

1. The State's Interest Is Nonexistent

California's interest in enacting section 354.6 is considerably weaker than it was even with respect to HVIRA, because here the statute possesses neither a state regulatory purpose nor any colorable claim to having been authorized by federal legislation. *Cf. Garamendi*, 123 S. Ct. at 2393 (discussing California's argument that Congress authorized laws like HVIRA in the McCarran-Ferguson Act and the U.S. Holocaust Assets Commission Act); *see also supra* n.14. Moreover, section 354.6 shares with HVIRA the fatal flaw that the conduct California seeks to govern – namely, conduct by Japan and Japanese nationals towards Korean and Chinese nationals in Asia during World War II – is wholly divorced from California. *Garamendi*, 123 S. Ct. at 2393 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981)); *see infra* section II.A.

Even more attenuated than its interest in *enacting* section 354.6 is California's interest in having the statute *applied* in these cases. At best, California might have an interest in the welfare of Korean and Chinese nationals who moved to the state *after* World War II, but *Garamendi* explicitly held that this factor should be accorded "'little or no significance.'" *Id.* (quoting *Shutts*, 472 U.S. at 820). Furthermore, as a matter of fact, only a few of the hundreds of thousands of putative class members in these cases have claimed California residency. ER 3 (*Kim* Complaint); ER 68 (*Sung* Complaint). Thus *no* cognizable state interest is at stake in these cases.

2. The Conflict with the Allied Treaty

Given the lack of state interest, only a minimal conflict is required for "conflict" preemption to exist under *Garamendi*. *Id.* at 2389 (strength of state interest determines "how serious a conflict must be shown before declaring the state

law preempted"). In this case, though, the conflict is clear and direct.

"The Treaty reflects the United States government's foreign policy determination that all war-related claims against Japan and its nationals – including private claims and including the claims of those whose governments were not party to the Treaty – should be resolved by *government-to-government agreement rather than litigation.*" App. F at 42a-43a, 49a, 54a.[16] This approach is in harmony with well-settled international and U.S. legal principles. *See, e.g., Ware*, 3 U.S. at 229 (Chase, J.).

With respect to Korea, U.S. law and policy is codified in article 4(a) of the Treaty, which commits the Korean petitioners' claims to resolution through "special arrangements" between Japan and Korea and leaves no room for any other U.S. law remedy. App. A at 3a. Article 26 of the Treaty obligated Japan to conclude separate treaties with China as well as Korea "on the same or substantially the same terms" as the Allied Treaty, including the latter's claims resolution provisions. App. A at 19a-20a. Private lawsuits in U.S. courts under California (or even federal) law are, of course, the antithesis of the diplomatic resolution mandated by the Treaty. *See* App. F at 53a-55a ("The Treaty of Peace . . . provides that the claims of Korea and China, and those of their nationals, will be resolved through inter-governmental agreements rather than through litigation."). Japan shares this view. SER 525 (Japan's *Note Verbale*) ("[T]hese issues should not be adjudicated in the courts in the United States."). Allowing claims to proceed in U.S. courts would therefore "undermine[] the intended purpose and 'natural effect'" of the Treaty. *See Crosby*, 530 U.S. at

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[16] "[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982).

373 (finding conflict preemption); App. F at 49a-50a (noting the "conflict[]" between section 354.6 and the Treaty), 55a (stating that Korean and Chinese plaintiffs "may not, consistent with the United States' policy adopted in the Treaty, pursue their claims in the courts of the United States.").

Very recently, a unanimous panel of the U.S. Court of Appeals for the District of Columbia Circuit found that the Treaty foreclosed war-related claims by Korean and Chinese nationals in U.S. courts. In *Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003), the court considered whether the commercial exception to the Foreign Sovereign Immunities Act could be applied retroactively to World War II events; the court concluded that it could not, in part because "the [Allied] Treaty manifests the parties' intent to resolve matters arising from World War II *without involving the courts of the United States* (or of any signatory nation)." *Id.* at 684-85. The court found that the Treaty "expressed a clear [U.S.] policy of resolving the claims of Korean and Chinese nationals through government-to-government negotiation." *Id.* at 685.[17] Indeed, as evidence of such subsequent negotiations, the *Joo* court cited the Japan-Korea Treaty and the Japan-ROC Treaty. *Id.*; *see also* App. B and App. C.

The certiorari petitions never mention the Treaty provisions directed to resolution of war claims among Japan, Korea and China, confining their treatment of the Treaty to stating that Korea and China were not signatories. The issue, however, is not whether Korea or China were signatories; it is that the Treaty "establish[es] the law of *the United States*

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[17] The court pointed to article 14 of the Treaty, which reciprocally waived all claims of Allied and Japanese nationals, and noted that "it would be odd indeed for the United States, on the one hand, to waive all claims of its nationals against Japan and, on the other hand, to allow non-[signatory] nationals to proceed against Japan in its courts." *Joo*, 332 F.3d at 685.

with respect to the war-related claims of Korean and Chinese nationals." App. F at 54a. That law – mandating resolution through diplomacy – binds U.S courts, including state courts and state legislatures; no other or additional remedy can be supplied under United States law.

One result of the diplomacy mandated by the Treaty was the Japan-Korea Treaty, which is "part and parcel of the framework created by the United States in 1951." SER 512 (U.S. Statement of Interest). That treaty *independently* precludes adjudication of petitioners' claims, for through it Japan paid Korea a half billion dollars in grants and loans, App. B at 21a-22a (art. I), and the parties "*settled completely and finally*" the "problem concerning property, rights and interests of the two Contracting Parties *and their nationals*" as well as "claims between the Contracting Parties *and their nationals*" (including juridical persons), App. B at 23a (art. II, ¶ 1). The claims resolved "include[d]" – but are not restricted to – "those provided for in" article 4 of the Allied Treaty – *i.e.*, reparations – and "claims that . . . Korean natural persons have against . . . *Japanese nationals* such as . . . *claims by Koreans against Japanese . . . corporations*." SER 370 (Agreed Minutes ¶ 2(g)); SER 320-22 (Republic of Korea, White Paper on Korea-Japan Talks (1965)); SER 346-47 (Outline of the "Eight Items" – Claims Made by Korea Against Japan).

Other products of the Treaty are the Japan-ROC and Japan-PRC treaties and the Joint Communiqué, which, separately and together, reciprocally settled all war claims of Japanese and Chinese nationals. In negotiating and signing these treaties, Japan complied not only with its obligations under the Allied Treaty, but with the admonition of the United States that Japan "pursue foreign policies in Asia which were generally compatible with those of the United States, particularly in relation to China." SER 376-77. The Japan-ROC Treaty literally incorporated by reference the "relevant provisions" of the Allied Treaty as the rule by

which "any problem" between the signatories resulting from "the existence of a state of war" "*shall be settled*" (unless the Japan-ROC Treaty, or its supplementary documents, provided otherwise). App. C at 29a (art. XI). Having concluded a treaty with the only government of China recognized by the United States – the ROC – Japan reasonably took the position that its treaty with the ROC resolved all war claims involving China. Nevertheless, in 1972, Japan responded to the United States' recognition of the PRC by opening negotiations to "normalize" its own relations with the PRC, SER 409-410, an "opening to China" that led to the Joint Communiqué in which Japan and the PRC agreed to language, carefully drafted as a political compromise to preserve the dignity of both sides, whereby the PRC declared "that in the interest of the friendship between the Chinese and the Japanese peoples," the PRC "*renounces its demand for war reparation from Japan.*" App. D at 33a (art. 5). The Japan-PRC Treaty, App. E, incorporated and reaffirmed the terms of the Joint Communiqué. Thus the fruit of the Allied Treaty's resolution of petitioners' claims via diplomacy resulted in other, nonjudicial resolutions of those claims under the laws of petitioners' own countries.[18]

3. The Overwhelming Federal Foreign Policy Interest

The resolution of World War II-era reparations claims against Japanese companies is an "area of uniquely federal interest" for all of the reasons discussed above with respect to the appropriateness of a "field" preemption analysis. *Garamendi*, 123 S. Ct. at 2389 n.11; *Boyle v. United Techs.*

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[18] As noted above, however, petitioners would be unable to proceed in U.S. courts even if the agreements between Japan and Korea and Japan and China permitted lawsuits. U.S. courts are bound by "the law of the United States," which mandates a nonjudicial resolution of "the war-related claims of Korean and Chinese nationals." App. F. at 54a.

Corp., 487 U.S. 500, 507-08 (1987). The Ninth Circuit carefully and correctly assessed this overwhelming federal interest, which provides a further reason that the balance of factors leads inexorably to preemption in these cases, even under a "conflict" theory analysis.

C. *Garamendi* Expressly Rejected Many of Petitioners' Specific Attacks on the Decision Below

In addition to validating the Ninth Circuit's foreign affairs preemption analysis, *Garamendi* addressed and rejected several of petitioners' arguments based on their (incorrect) assumption that *Low* was decided correctly. Both petitions insist that foreign affairs preemption does not apply to suits against "private" parties. *Oh* Pet. at 2, 16, 18, 20; *Ma* Pet. at 18 and 21. *Garamendi*, however, flatly rejected any "distinction" between companies and governments of "formerly belligerent states." 123 S. Ct. at 2387. Observing that "untangling government policy from private initiative during war time is often so hard that diplomatic action settling claims against private parties may well be just as essential in the aftermath of hostilities as diplomacy to settle claims against foreign governments," this Court found that the attempted distinction simply "does not matter". *Id.* What was true in *Garamendi* is doubly so here, where petitioners have *alleged* that the *Japanese government* ordered their forced labor. *See, e.g.*, ER 34 (*Choe* complaint); ER 97, 98-99 (*Sin* complaint); ER 123-24 (*Oh* complaint). Indeed, as the Ninth Circuit recognized, the only suits permitted by section 354.6 are against "'enterprises'" that, "if not themselves our wartime enemies, were operating in enemy territory and presumably – no party disputes this – with the consent and for the benefit of our wartime enemy." *Oh* Pet. App. at 23a (quoting § 354.6(a)(1), (2)).

The *Oh* petitioners also make the odd argument that section 354.6 is not subject to preemption because it does "not focus on any single country." *Oh* Pet. at 17. Not only

is their premise wrong – the statute focuses solely on conduct of the "Nazi regime, its allies and sympathizers," while ignoring forced labor practices of other countries or eras, § 354.6(a)(1), (2) – but also the reach of HVIRA was even broader. As the *Oh* petitioners concede, HVIRA did not "target any particular country," *Oh* Pet. at 14-15, yet its wider scope posed no obstacle to the application of foreign affairs preemption in *Garamendi*.

Petitioners also incorrectly characterize section 354.6 as purely a statute of limitations, implying that it cannot therefore interfere with foreign affairs. *Oh* Pet. at 2, 6-7; *Ma* Pet. at 22-25. Once again, the premise is wrong. As the Ninth Circuit found, and as discussed in section II.A.3. *infra*, section 354.6 is *not* merely a limitations statute. But, even if it were, petitioners cite no authority differentiating between limitations and substantive statutes in a foreign affairs analysis, and, as the Ninth Circuit recognized, neither logic nor policy permits such a distinction. *See Oh* Pet. App. at 14a ("Whether substantive or procedural," section 354.6 creates a "new rule [that] profoundly alters the likelihood that" Second World War reparations "actions will succeed.").

Just as misguided is petitioners' argument that section 354.6 does not "implicate *current* foreign policy." *Oh* Pet. at 16, 21; *Ma* Pet. at 21. The Allied Treaty, although signed some 50 years ago, is current law in the United States and Japan. As the United States advised the lower courts, it remains the cornerstone of U.S. foreign policy in the Far East and is as much an expression of U.S. and Japanese foreign policy today as it was in 1951. SER 505 (U.S. Statement of Interest). Section 354.6 therefore *does* affect ongoing foreign relations – indeed, the United States and Japan agree that the law threatens to "jeopardiz[e] relations between the United States and Japan and Japan and its Asian neighbors." SER 520 (U.S. Statement of Interest); *see* SER 525 (*Note Verbale*).

Petitioners' contention that the Ninth Circuit applied a "rigid rule" so broad that it would preclude numerous suits that other courts have allowed to go forward, *Oh* Pet. at 22-28; *Ma* Pet. at 19-22, misrepresents both the Ninth Circuit's decision and the suits that other courts have entertained. Contrary to petitioners' assertions that the Ninth Circuit's holding precludes any state cause of action "*somehow relate[d] to war*," *Oh* Pet. at i, *see also Oh* Pet. at 25-27, that arose "before or during a time of war" *see, e.g.*, *Ma* Pet. at i, *see also Ma* Pet. at 12, 14, 18-19 and 21, the decision contains neither words nor reasoning that remotely could yield such a result.

The Ninth Circuit's holding, in fact, is narrow: "section 354.6 is impermissible because it intrudes on the federal government's exclusive power to *make and resolve war, including the procedure for resolving war claims*." *Oh* Pet. App. at 23a. This holding is further limited by the court's explicit reliance on the fact that the federal government "has *already exercised*" its authority to resolve the war it waged. *Oh* Pet. App. at 24a. Of the cases that petitioners allege are in conflict with the Ninth Circuit's opinion, none involves the core federal power to resolve, through a treaty or otherwise, a war waged by the United States or a state-created cause of action devoted to war reparations. Thus there is *no* contradiction between the Ninth Circuit's holding and the cases petitioners cite. *Oh* Pet. at 25-27; *Ma* Pet. at 20-21.

II. Alternative Grounds for Dismissal Make Grant of Certiorari Inappropriate

Preemption is only one of many grounds for dismissing petitioners' claims. Respondents briefly bring a few of these to the Court's attention both to inform the decision on the petitions and to request that, should review on the issue of foreign affairs preemption be granted, these grounds also be considered as a basis for affirmance.

A. Applying California Law Would Violate Due Process

One of the issues on which certiorari was granted in *Garamendi* was whether HVIRA exceeded California's "legislative jurisdiction" under the Due Process Clause, given the tenuous connection between California and the issuance of insurance policies in Europe decades ago. *Garamendi*, 123 S. Ct. at 2385 n.7. While the Court did not reach the issue in *Garamendi, id.*, in this case there can be no doubt that the Due Process Clause forbids California to apply its law to the conduct of Japan and Japanese nationals toward Koreans and Chinese in Asia during World War II.

1. Due Process Requires Significant Contacts Between California and the Conduct It Regulates

As *Garamendi* explained, "the general standards for evaluating a State's claim to apply its forum law to a particular controversy or transaction" may be found in this Court's opinions in *Shutts* and *Allstate*. 123 S. Ct. at 2393. Those standards make it unconstitutional to apply the law of a "State [that] has only an insignificant contact with the parties *and the occurrence or transaction.*" *Allstate*, 449 U.S. at 310-11 (plurality); *id.* at 333 (Powell, J., dissenting); *see also Shutts*, 472 U.S. at 822 (state "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them"). In *Shutts*, for example, this Court held that Kansas law could not constitutionally govern claims of non-Kansas petitioners against a non-Kansas respondent regarding non-Kansas leases, even though respondent "own[ed] property and conduct[ed] substantial business in the State" and "hundreds of Kansas plaintiffs were [also] affected" by the challenged conduct. *Id.*, 472 U.S. at 818-22.

A state may apply its law only if it has "'a *significant contact or significant aggregation of contacts*, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" *Shutts*, 472 U.S. at 818 (quoting

Allstate, 449 U.S. at 312-13); *accord Franchise Tax Bd. v. Hyatt*, 123 S. Ct. 1683, 1687 (2003). In determining whether "application of [forum law is] sufficiently arbitrary and unfair as to exceed constitutional limits," the "expectation of the parties [is] an important element." *Shutts*, 472 U.S. at 822.

Here, the conduct at issue is wholly unconnected to California. *None* of the petitioners had any relationship with California at the time of the alleged conduct, and almost none does even now. Neither petitioners nor respondents, at the time of the events, could "reasonably have anticipated that their actions would later be judged" by California law. *Allstate*, 449 U.S. at 327 (Stevens, J., concurring). Thus section 354.6, as applied, exceeds California's legislative jurisdiction.

2. The Presence Today of Some Petitioners and Respondents in California Does Not Satisfy Due Process

Nor is the absence of any "significant contact" between California and these cases cured because a few petitioners may have become California residents in the sixty years since their claims arose. "'Even if a plaintiff evidences his desire for forum law by moving to the forum,'" this Court has "'generally accorded such a move little or no significance.'" *Garamendi*, 123 S. Ct. at 2393 (quoting *Shutts*, 472 U.S. 820); *see also Allstate*, 449 U.S. at 319 (plurality) ("[A] postoccurrence change of residence to the forum State [is] insufficient" in and of itself to confer power on the forum State to choose its law.) *cited in Garamendi*, 123 S. Ct. at 2393.

No more pertinent is the amenability of some respondents to personal jurisdiction in California.[19] "[W]hile a State

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[19] Petitioners assert claims under section 354.6 against U.S. subsidiaries that came into being long after World War II, and therefore (continued ...)

may . . . assume jurisdiction over the claims of [parties] whose principal contacts are with other States, it *may not use this assumption of jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law.*" *Shutts*, 472 U.S. at 819, 821.

3. Calling the Statute "Procedural" Does Not Cure the Due Process Violation

Both petitioners and the California Attorney General admitted in the District Court that section 354.6 is not just a statute of limitations that extends the time within which claims under existing law can be filed, but creates a new cause of action – which petitioners in fact sued upon – and without which, they also admit by their arguments in this Court, they would have no claim at all. Plaintiffs' Supplemental Brief Regarding the Constitutionality of Code of Civil Procedure Section 354.6, filed Mar. 1, 2001, at 2, 3; *Amicus Curiae* Brief of the Attorney General of the State of California, filed Aug. 8, 2000, at 4. Now, however, these parties, hoping to evade the rule of *Shutts*, have altered their position, contending that the statute is only a "procedural" statute of limitations. *See, e.g., Oh* Pet. at 2, 6-7; *Ma* Pet. at 22-25.

Even if these parties were free to change position – and they were not, *see, e.g., Helfand v. Gerson,* 105 F.3d 530, 535-36 (9th Cir. 1996) – their revised argument is both wrong and irrelevant. It is wrong because, as the Ninth Circuit observed, the statute "explicitly creates a cause of action by providing that certain individuals 'may bring an

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(... continued)
had no involvement whatsoever in any of the alleged forced labor. The further due process violation that would result from applying the statute to such entities provides yet another basis for affirming the court of appeals. *See Gerling Global Reins. Corp.* v. *Nelson*, 123 F. Supp. 2d 1298, 1302 (N.D. Fla. 2000), *aff'd, Gerling Global Reins. Corp. of Am.* v. *Gallagher*, 267 F.3d 1228 (11th Cir. 2001).

action' for certain wrongs." *Oh* Pet. App. at 12a (quoting § 354.6(b) and citing *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 644 (2002) (statute providing party "may bring an action" "reads like the conferral of a private right of action")). Further, the limitations period of section 354.6(c) applies only to "action[s] *brought* under *this section*," *i.e.*, actions maintained under section 354.6 itself.[20] Thus it cannot be just a statute of limitations, for it would not have any claim to limit. Petitioners' assertion of claims directly based on section 354.6 also confirms its substantive nature. ER 24 (*Kim)*; ER 56 (*Choe*); ER 80 (*Sung*); ER 103 (*Sin*); ER 126 (*Oh*); ER 153 (*Su*); ER 254 (*Ma*).

The argument is irrelevant because, even if section 354.6 *were* merely a statute of limitations that revived other California claims, subjecting respondents to liability for those claims would itself violate due process, for the reasons discussed in part, II.A.1. *supra*. It would also run afoul of the constitutional prohibition on retroactive legislation. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994); *cf. Stogner v. California,* 123 S. Ct. 2446 (2003) (a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when applied to revive a previously time-barred criminal prosecution). The Ninth Circuit, although not deciding the retroactivity issue, recognized that "[s]uch a revival of liability – even civil

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[20] The *Ma* petition alludes to a supposed conflict between the Ninth Circuit's decision and the California Court of Appeal decision in *Taiheiyo Cement Co. v. Superior Court (Jeong)* on the issue of whether section 354.6 creates a cause of action. *See Ma* Pet. at 1, 15-16 (arguing that the "embarrassing conflict" between *Taiheiyo* and *Deutsch* adds "some urgency to the need for this Court's review"). As petitioners acknowledge, however (*id.* at 1), the decision in *Taiheiyo* has been superseded by the California Supreme Court's grant of review. *See Taiheiyo Cement Co. v. Superior Court (Jeong)*, 66 P.3d 1231 (Cal. 2003), and Cal. Rule of Court 976(c).

liability – is troubling and raises serious due process questions." *Oh* Pet. App. at 14a.

B. Petitioners' Claims Are Precluded by Japan's Treaties with Korea and China

As discussed briefly *supra* pp. 21-22, the bilateral treaties Japan entered into with Korea and China, in obedience to the Allied Treaty and consistent with U.S. foreign policy, all contain provisions effectively settling and barring all war-related claims of Korean and Chinese nationals. The Japan-Korea Treaty's waiver of claims provision has also been implemented through domestic legislation in both countries. SER 30, 45-71 (Declaration of Akifa Kotera, Professor of International Law at the University of Tokyo); SER 76-77 (Declaration of Yuji Iwasawa, Professor of International Law at the University of Tokyo).

C. Petitioners' Claims Are Nonjusticiable

As discussed briefly above, the negotiations culminating in the Allied Treaty accommodated diverse policies and interests of both signatory and nonsignatory states, including Korea and China. Petitioners ask this Court to set aside these policies and political compromises, the fruits of which remain the cornerstone of U.S. foreign policy in Asia, and to put the courts of California in the business of deciding war claims – an inherently political, nonjudicial realm. This course is foreclosed by the political question doctrine.

Baker v. Carr, 369 U.S. 186, 210-11 (1962) identified six indicia of nonjusticiable, political questions; if even *one* is present, a case must be dismissed. 369 U.S. at 217. All six *Baker* indicia are present here. Matters of war and peace, including resolution of war claims, are foreign affairs issues "constitutionally committed" to the political branches, and the actions of those branches in negotiating and adopting the Treaty framework required numerous "policy determination[s]" that are entitled to "respect" and

"unquestioning adherence." *See id.* Not only would it create a "potentiality of embarrassment from multifarious pronouncements" for a court to revisit these long-resolved political issues – as the United States urged below – courts simply lack the ability to perform the type of political calculus involved in resolving war claims. *See id.* The Treaty framework consists of "reparations agreements which the United States and other World War II combatants (whose blood and treasure brought the war of conquest . . . to an end) forged in the crucible of a devastated post-war [world] and in the crucible of the Cold War" – agreements "which the court does not have the judicial power" to refashion, even had they the necessary wisdom. *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 282 (D.N.J. 1999).

Conclusion

The Court should deny the petitions outright. The foreign affairs analysis of the decision below accords with, and the judgment is compelled by, *Garamendi.* Should this Court nevertheless choose to consider the foreign affairs doctrine issues raised by petitioners, it should also certify for review respondents' alternative grounds for dismissal of the complaints.

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Dated: August 4, 2003

APPENDICES

Appendix A

TREATY OF PEACE WITH JAPAN
Sept. 8, 1951
San Francisco, California

Whereas the Allied Powers and Japan are resolved that henceforth their relations shall be those of nations which, as sovereign equals, cooperate in friendly association to promote their common welfare and to maintain international peace and security, and are therefore desirous of concluding a Treaty of Peace which will settle questions still outstanding as a result of the existence of a state of war between them;

Whereas Japan for its part declares its intention to apply for membership in the United Nations and in all circumstances to conform to the principles of the Charter of the United Nations; to strive to realize the objectives of the Universal Declaration of Human Rights; to seek to create within Japan conditions of stability and well-being as defined in Articles 55 and 56 of the Charter of the United Nations and already initiated by post-surrender Japanese legislation; and in public and private trade and commerce to conform to internationally accepted fair practices;

Whereas the Allied Powers welcome the intentions of Japan set out in the foregoing paragraph;

The Allied Powers and Japan have therefore determined to conclude the present Treaty of Peace, and have accordingly appointed the undersigned Plenipotentiaries, who, after presentation of their full powers, found in good and due form, have agreed on the following provisions:

Appendix A

CHAPTER I

PEACE

Article 1

(a) The state of war between Japan and each of the Allied Powers is terminated as from the date on which the present Treaty comes into force between Japan and the Allied Power concerned as provided for in Article 23.

(b) The Allied Powers recognize the full sovereignty of the Japanese people over Japan and its territorial waters.

CHAPTER II

TERRITORY

Article 2

(a) Japan recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet.

(b) Japan renounces all right, title and claim to Formosa and the Pescadores.

(c) Japan renounces all right, title and claim to the Kurile Islands, and to that portion of Sakhalin and the islands adjacent to it over which Japan acquired sovereignty as a consequence of the Treaty of Portsmouth of September 5, 1905.

(d) Japan renounces all right, title and claim in connection with the League of Nations Mandate System, and accepts the action of the United Nations Security Council of April 2, 1947, extending the trusteeship system to the Pacific Islands formerly under mandate to Japan.

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(e) Japan renounces all claim to any right or title to or interest in connection with any part of the Antarctic area, whether deriving from the activities of Japanese nationals or otherwise.

(f) Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands.

Article 3

Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29° north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands) and Parece Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters.

Article 4

(a) Subject to the provisions of paragraph (b) of this Article, the disposition of property of Japan and of its nationals in the areas referred to in Article 2, and their claims, including debts, against the authorities presently administering such areas and the residents (including juridical persons) thereof, and the disposition in Japan of property of such authorities and residents, and of claims, including debts, of such authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and such authorities. The property of any of the Allied Powers or its nationals in the areas referred to in Article 2 shall, insofar as this has not already been done, be returned by the administering authority in the condition in which it now exists. (The term nationals whenever used in the present Treaty includes juridical persons.)

(b) Japan recognizes the validity of dispositions of property of Japan and Japanese nationals made by or pursuant to directives of the United States Military Government in any of the areas referred to in Articles 2 and 3.

(c) Japanese owned submarine cables connecting Japan with territory removed from Japanese control pursuant to the present Treaty shall be equally divided, Japan retaining the Japanese terminal and adjoining half of the cable, and the detached territory the remainder of the cable and connecting terminal facilities.

CHAPTER III

SECURITY

Article 5

(a) Japan accepts the obligations set forth in Article 2 of the Charter of the United Nations, and in particular the obligations

(i) to settle its international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered;

(ii) to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the Purposes of the United Nations;

(iii) to give the United Nations every assistance in any action it takes in accordance with the Charter and to refrain from giving assistance to any State against which the United Nations may take preventive or enforcement action.

(b) The Allied Powers confirm that they will be guided by the principles of Article 2 of the Charter of the United Nations in their relations with Japan.

(c) The Allied Powers for their part recognize that Japan as a sovereign nation possesses the inherent right of individual or collective self-defense referred to in Article 51 of the Charter of the United Nations and that Japan may voluntarily enter into collective security arrangements.

Article 6

(a) All occupation forces of the Allied Powers shall be withdrawn from Japan as soon as possible after the coming into force of the present Treaty, and in any case not later than 90 days thereafter. Nothing in this provision shall, however, prevent the stationing or retention of foreign armed forces in Japanese territory under or in consequence of any bilateral or multilateral agreements which have been or may be made between one or more of the Allied Powers, on the one hand, and Japan on the other.

(b) The provisions of Article 9 of the Potsdam Proclamation of 26 July 1945, dealing with the return of Japanese military forces to their homes, to the extent not already completed, will be carried out.

(c) All Japanese property for which compensation has not already been paid, which was supplied for the use of the occupation forces and which remains in the possession of those forces at the time of the coming into force of the present Treaty, shall be returned to the Japanese Government within the same 90 days unless other arrangements are made by mutual agreement.

CHAPTER IV

POLITICAL AND ECONOMIC CLAUSES

Article 7

(a) Each of the Allied Powers, within one year after the present Treaty has come into force between it and Japan, will notify

Appendix A

Japan which of its prewar bilateral treaties or conventions with Japan it wishes to continue in force or revive, and any treaties or conventions so notified shall continue in force or by revived subject only to such amendments as may be necessary to ensure conformity with the present Treaty. The treaties and conventions so notified shall be considered as having been continued in force or revived three months after the date of notification and shall be registered with the Secretariat of the United Nations. All such treaties and conventions as to which Japan is not so notified shall be regarded as abrogated.

(b) Any notification made under paragraph (a) of this Article may except from the operation or revival of a treaty or convention any territory for the international relations of which the notifying Power is responsible, until three months after the date on which notice is given to Japan that such exception shall cease to apply.

Article 8

(a) Japan will recognize the full force of all treaties now or hereafter concluded by the Allied Powers for terminating the state of war initiated on September 1, 1939, as well as any other arrangements by the Allied Powers for or in connection with the restoration of peace. Japan also accepts the arrangements made for terminating the former League of Nations and Permanent Court of International Justice.

(b) Japan renounces all such rights and interests as it may derive from being a signatory power of the Conventions of St. Germain-en-Laye of September 10, 1919, and the Straits Agreement of Montreux of July 20, 1936, and from Article 16 of the Treaty of Peace with Turkey signed at Lausanne on July 24, 1923.

(c) Japan renounces all rights, title and interests acquired under, and is discharged from all obligations resulting from, the Agreement between Germany and the Creditor Powers of

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January 20, 1930 and its Annexes, including the Trust Agreement, dated 17 May 1930, the Convention of January 20, 1930, respecting the Bank for International Settlements; and the Statutes of the Bank for International Settlements. Japan will notify to the Ministry of Foreign Affairs in Paris within six months of the first coming into force of the present Treaty its renunciation of the rights, title and interests referred to in this paragraph.

Article 9

Japan will enter promptly into negotiations with the Allied Powers so desiring for the conclusion of bilateral and multilateral agreements providing for the regulation or limitation of fishing and the conservation and development of fisheries on the high seas.

Article 10

Japan renounces all special rights and interests in China, including all benefits and privileges resulting from the provisions of the final Protocol signed at Peking on September 7, 1901, and all annexes, notes and documents supplementary thereto, and agrees to the abrogation in respect to Japan of the said protocol, annexes, notes and documents.

Article 11

Japan accepts the judgments of the International Military Tribunal for the Far East and of other Allied War Crimes Courts both within and outside Japan, and will carry out the sentences imposed thereby upon Japanese nationals imprisoned in Japan. The power to grant clemency, to reduce sentences and to parole with respect to such prisoners may not be exercised except on the decision of the Government or Governments which imposed the sentence in each instance, and on recommendation of Japan. In the case of persons sentenced by the International Military Tribunal for the Far East, such power may not be exercised

except on the decision of a majority of the Governments represented on the Tribunal, and on the recommendation of Japan.

Article 12

(a) Japan declares its readiness promptly to enter into negotiations for the conclusion with each of the Allied Powers of treaties or agreements to place their trading, maritime and other commercial relations on a stable and friendly basis.

(b) Pending the conclusion of the relevant treaty or agreement, Japan will, during a period of four years from the first coming into force of the present Treaty

(1) accord to each of the Allied Powers, its nationals, products and vessels

(i) most-favored-nation treatment with respect to customs duties, charges, restrictions and other regulations on or in connection with the importation and exportation of goods;

(ii) national treatment with respect to shipping, navigation and imported goods, and with respect to natural and juridical persons and their interests - such treatment to include all matters pertaining to the levying and collection of taxes, access to the courts, the making and performance of contracts, rights to property (tangible and intangible), participating in juridical entities constituted under Japanese law, and generally the conduct of all kinds of business and professional activities;

(2) ensure that external purchases and sales of Japanese state trading enterprises shall be based solely on commercial considerations.

(c) In respect to any matter, however, Japan shall be obliged to accord to an Allied Power national treatment, or most-favored-nation treatment, only to the extent that the Allied Power concerned accords Japan national treatment or most-favored-

nation treatment, as the case may be, in respect of the same matter. The reciprocity envisaged in the foregoing sentence shall be determined, in the case of products, vessels and juridical entities of, and persons domiciled in, any non-metropolitan territory of an Allied Power, and in the case of juridical entities of, and persons domiciled in, any state or province of an Allied Power having a federal government, by reference to the treatment accorded to Japan in such territory, state or province.

(d) In the application of this Article, a discriminatory measure shall not be considered to derogate from the grant of national or most-favored-nation treatment, as the case may be, if such measure is based on an exception customarily provided for in the commercial treaties of the party applying it, or on the need to safeguard that party's external financial position or balance of payments (except in respect to shipping and navigation), or on the need to maintain its essential security interests, and provided such measure is proportionate to the circumstances and not applied in an arbitrary or unreasonable manner.

(e) Japan's obligations under this Article shall not be affected by the exercise of any Allied rights under Article 14 of the present Treaty; nor shall the provisions of this Article be understood as limiting the undertakings assumed by Japan by virtue of Article 15 of the Treaty.

Article 13

(a) Japan will enter into negotiations with any of the Allied Powers, promptly upon the request of such Power or Powers, for the conclusion of bilateral or multilateral agreements relating to international civil air transport.

(b) Pending the conclusion of such agreement or agreements, Japan will, during a period of four years from the first coming into force of the present Treaty, extend to such Power treatment not less favorable with respect to air-traffic rights and privileges

than those exercised by any such Powers at the date of such coming into force, and will accord complete equality of opportunity in respect to the operation and development of air services.

(c) Pending its becoming a party to the Convention on International Civil Aviation in accordance with Article 93 thereof, Japan will give effect to the provisions of that Convention applicable to the international navigation of aircraft, and will give effect to the standards, practices and procedures adopted as annexes to the Convention in accordance with the terms of the Convention.

CHAPTER V

CLAIMS AND PROPERTY

Article 14

(a) It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations.

Therefore,

1. Japan will promptly enter into negotiations with Allied Powers so desiring, whose present territories were occupied by Japanese forces and damaged by Japan, with a view to assisting to compensate those countries for the cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging and other work for the Allied Powers in question. Such arrangements shall avoid the imposition of additional liabilities on other Allied Powers, and, where the manufacturing of raw materials is called for, they

shall be supplied by the Allied Powers in question, so as not to throw any foreign exchange burden upon Japan.

2. (I) Subject to the provisions of subparagraph (II) below, each of the Allied Powers shall have the right to seize, retain, liquidate or otherwise dispose of all property, rights and interests of

(a) Japan and Japanese nationals,

(b) persons acting for or on behalf of Japan or Japanese nationals, and

(c) entities owned or controlled by Japan or Japanese nationals, which on the first coming into force of the present Treaty were subject to its jurisdiction. The property, rights and interests specified in this subparagraph shall include those now blocked, vested or in the possession or under the control of enemy property authorities of Allied Powers, which belong to, or were held or managed on behalf of, any of the persons or entities mentioned in (a), (b) or (c) above at the time such assets came under the controls of such authorities.

(II) The following shall be excepted from the right specified in subparagraph (I) above:

(i) property of Japanese natural persons who during the war resided with the permission of the Government concerned in the territory of one of the Allied Powers, other than territory occupied by Japan, except property subjected to restrictions during the war and not released from such restrictions as of the date of the first coming into force of the present Treaty;

(ii) all real property, furniture and fixtures owned by the Government of Japan and used for diplomatic or consular purposes, and all personal furniture and furnishings and other private property not of an investment nature which was normally necessary for the carrying out of diplomatic and

consular functions, owned by Japanese diplomatic and consular personnel;

(iii) property belonging to religious bodies or private charitable institutions and used exclusively for religious or charitable purposes;

(iv) property, rights and interests which have come within its jurisdiction in consequence of the resumption of trade and financial relations subsequent to September 2, 1945, between the country concerned and Japan, except such as have resulted from transactions contrary to the laws of the Allied Power concerned;

(v) obligations of Japan or Japanese nationals, any right, title or interest in tangible property located in Japan, interests in enterprises organized under the laws of Japan, or any paper evidence thereof; provided that this exception shall only apply to obligations of Japan and its nationals expressed in Japanese currency.

(III) Property referred to in exceptions (i) through (v) above shall be returned subject to reasonable expenses for its preservation and administration. If any such property has been liquidated the proceeds shall be returned instead.

(IV) The right to seize, retain, liquidate or otherwise dispose of property as provided in subparagraph (I) above shall be exercised in accordance with the laws of the Allied Power concerned, and the owner shall have only such rights as may be given him by those laws.

(V) The Allied Powers agree to deal with Japanese trademarks and literary and artistic property rights on a basis as favorable to Japan as circumstances ruling in each country will permit.

(b) Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers,

other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

Article 15

(a) Upon application made within nine months of the coming into force of the present Treaty between Japan and the Allied Power concerned, Japan will, within six months of the date of such application, return the property, tangible and intangible, and all rights or interests of any kind in Japan of each Allied Power and its nationals which was within Japan at any time between December 7, 1941 and September 2, 1945, unless the owner has freely disposed thereof without duress or fraud. Such property shall be returned free of all encumbrances and charges to which it may have become subject because of the war, and without any charges for its return. Property whose return is not applied for by or on behalf of the owner or by his Government within the prescribed period may be disposed of by the Japanese Government as it may determine. In cases where such property was within Japan on December 7, 1941, and cannot be returned or has suffered injury or damage as a result of the war, compensation will be made on terms not less favorable than the terms provided in the draft Allied Powers Property Compensation Law approved by the Japanese Cabinet on July 13, 1951.

(b) With respect to industrial property rights impaired during the war, Japan will continue to accord to the Allied Powers and their nationals benefits no less than those heretofore accorded by Cabinet Orders No. 309 effective September 1, 1949, No. 12 effective January 28, 1950, and No. 9 effective February 1, 1950, all as now amended, provided such nationals have applied for such benefits within the time limits prescribed therein.

(c) (i) Japan acknowledges that the literary and artistic property rights which existed in Japan on December 7, 1941, in respect

to the published and unpublished works of the Allied Powers and their nationals have continued in force since that date, and recognizes those rights which have arisen, or but for the war would have arisen, in Japan since that date, by the operation of any conventions and agreements to which Japan was a party on that date, irrespective of whether or not such conventions or agreements were abrogated or suspended upon or since the outbreak of war by the domestic law of Japan or of the Allied Power concerned.

(ii) Without the need for application by the proprietor of the right and without the payment of any fee or compliance with any other formality, the period from December 7, 1941, until the coming into force of the present Treaty between Japan and the Allied Power concerned shall be excluded from the running of the normal term of such rights; and such period, with an additional period of six months, shall be excluded from the time within which a literary work must be translated into Japanese in order to obtain translating rights in Japan.

Article 16

As an expression of its desire to indemnify those members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of war of Japan, Japan will transfer its assets and those of its nationals in countries which were neutral during the war, or which were at war with any of the Allied Powers, or, at its option, the equivalent of such assets, to the International Committee of the Red Cross which shall liquidate such assets and distribute the resultant fund to appropriate national agencies, for the benefit of former prisoners of war and their families on such basis as it may determine to be equitable. The categories of assets described in Article 14(a)2(II)(ii) through (v) of the present Treaty shall be excepted from transfer, as well as assets of Japanese natural persons not residents of Japan on the first coming into force of the Treaty. It is equally understood that the transfer provision of this Article has no

application to the 19,770 shares in the Bank for International Settlements presently owned by Japanese financial institutions.

Article 17

(a) Upon the request of any of the Allied Powers, the Japanese Government shall review and revise in conformity with international law any decision or order of the Japanese Prize Courts in cases involving ownership rights of nationals of that Allied Power and shall supply copies of all documents comprising the records of these cases, including the decisions taken and orders issued. In any case in which such review or revision shows that restoration is due, the provisions of Article 15 shall apply to the property concerned.

(b) The Japanese Government shall take the necessary measures to enable nationals of any of the Allied Powers at any time within one year from the coming into force of the present Treaty between Japan and the Allied Power concerned to submit to the appropriate Japanese authorities for review any judgment given by a Japanese court between 7 December 1941 and such coming into force, in any proceedings in which any such national was unable to make adequate presentation of his case either as plaintiff or defendant. The Japanese Government shall provide that, where the national has suffered injury by reason of any such judgment, he shall be restored in the position in which he was before the judgment was given or shall be afforded such relief as may be just and equitable in the circumstances.

Article 18

(a) It is recognized that the intervention of the state of war has not affected the obligation to pay pecuniary debts arising out of obligations and contracts (including those in respect of bonds) which existed and rights which were acquired before the existence of a state of war, and which are due by the Government or nationals of Japan to the Government or nationals of one of the Allied Powers, or are due by the

Government or nationals of one of the Allied Powers to the Government or nationals of Japan. The intervention of a state of war shall equally not be regarded as affecting the obligation to consider on their merits claims for loss or damage to property or for personal injury or death which arose before the existence of a state of war, and which may be presented or re-presented by the Government of one of the Allied Powers to the Government of Japan, or by the Government of Japan to any of the Governments of the Allied Powers. The provisions of this paragraph are without prejudice to the rights conferred by Article 14.

(b) Japan affirms its liability for the prewar external debt of the Japanese State and for debts of corporate bodies subsequently declared to be liabilities of the Japanese State, and expresses its intention to enter into negotiations at an early date with its creditors with respect to the resumption of payments on those debts; to encourage negotiations in respect to other prewar claims and obligations; and to facilitate the transfer of sums accordingly.

Article 19

(a) Japan waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war or out of actions taken because of the existence of a state of war, and waives all claims arising from the presence, operations or actions of forces or authorities of any of the Allied Powers in Japanese territory prior to the coming into force of the present Treaty.

(b) The foregoing waiver includes any claims arising out of actions taken by any of the Allied Powers with respect to Japanese ships between September 1, 1939, and the coming into force of the present Treaty, as well as any claims and debts arising in respect to Japanese prisoners of war and civilian internees in the hands of the Allied Powers, but does not include

Appendix A

Japanese claims specifically recognized in the laws of any Allied Power enacted since September 2, 1945.

(c) Subject to reciprocal renunciation, the Japanese Government also renounces all claims (including debts) against Germany and German nationals on behalf of the Japanese Government and Japanese nationals, including intergovernmental claims and claims for loss or damage sustained during the war, but excepting (a) claims in respect of contracts entered into and rights acquired before September 1, 1939, and (b) claims arising out of trade and financial relations between Japan and Germany after September 2, 1945. Such renunciation shall not prejudice actions taken in accordance with Articles 16 and 20 of the present Treaty.

(d) Japan recognizes the validity of all acts and omissions done during the period of occupation under or in consequence of directives of the occupation authorities or authorized by Japanese law at that time, and will take no action subjecting Allied nationals to civil or criminal liability arising out of such acts or omissions.

Article 20

Japan will take all necessary measures to ensure such disposition of German assets in Japan as has been or may be determined by those powers entitled under the Protocol of the proceedings of the Berlin Conference of 1945 to dispose of those assets, and pending the final disposition of such assets will be responsible for the conservation and administration thereof.

Article 21

Notwithstanding the provisions of Article 25 of the present Treaty, China shall be entitled to the benefits of Articles 10 and 14(a)2; and Korea to the benefits of Articles 2, 4, 9 and 12 of the present Treaty.

Appendix A

CHAPTER VI

SETTLEMENT OF DISPUTES

Article 22

If in the opinion of any Party to the present Treaty there has arisen a dispute concerning the interpretation or execution of the Treaty, which is not settled by reference to a special claims tribunal or by other agreed means, the dispute shall, at the request of any party thereto, be referred for decision to the International Court of Justice. Japan and those Allied Powers which are not already parties to the Statute of the International Court of Justice will deposit with the Registrar of the Court, at the time of their respective ratifications of the present Treaty, and in conformity with the resolution of the United Nations Security Council, dated October 15, 1946, a general declaration accepting the jurisdiction, without special agreement, of the Court generally in respect to all disputes of the character referred to in this Article.

CHAPTER VII

FINAL CLAUSES

Article 23

(a) The present Treaty shall be ratified by the States which sign it, including Japan, and will come into force for all the States which have then ratified it, when instruments of ratification have been deposited by Japan and by a majority, including the United States of America as the principal occupying Power, of the following States, namely Australia, Canada, Ceylon, France, Indonesia, the Kingdom of the Netherlands, New Zealand, Pakistan, the Republic of the Philippines, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. The present Treaty shall come into force of each State

which subsequently ratifies it, on the date of the deposit of its instrument of ratification.

(b) If the Treaty has not come into force within nine months after the date of the deposit of Japan's ratification, any State which has ratified it may bring the Treaty into force between itself and Japan by a notification to that effect given to the Governments of Japan and the United States of America not later than three years after the date of deposit of Japan's ratification.

Article 24

All instruments of ratification shall be deposited with the Government of the United States of America which will notify all the signatory States of each such deposit, of the date of the coming into force of the Treaty under paragraph (a) of Article 23, and of any notifications made under paragraph (b) of Article 23.

Article 25

For the purposes of the present Treaty the Allied Powers shall be the States at war with Japan, or any State which previously formed a part of the territory of a State named in Article 23, provided that in each case the State concerned has signed and ratified the Treaty. Subject to the provisions of Article 21, the present Treaty shall not confer any rights, titles or benefits on any State which is not an Allied Power as herein defined; nor shall any right, title or interest of Japan be deemed to be diminished or prejudiced by any provision of the Treaty in favor of a State which is not an Allied Power as so defined.

Article 26

Japan will be prepared to conclude with any State which signed or adhered to the United Nations Declaration of January 1, 1942, and which is at war with Japan, or with any State which

previously formed a part of the territory of a State named in Article 23, which is not a signatory of the present Treaty, a bilateral Treaty of Peace on the same or substantially the same terms as are provided for in the present Treaty, but this obligation on the part of Japan will expire three years after the first coming into force of the present Treaty. Should Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty.

Article 27

The present Treaty shall be deposited in the archives of the Government of the United States of America which shall furnish each signatory State with a certified copy thereof.

Appendix B

AGREEMENT ON THE SETTLEMENT OF PROBLEMS CONCERNING PROPERTY AND CLAIMS AND ON THE ECONOMIC CO-OPERATION BETWEEN JAPAN AND THE REPUBLIC OF KOREA

June 22, 1965
Tokyo, Japan

Japan and the Republic of Korea,

Desiring to settle [the] problem concerning property of the two countries and their nationals and claims between the two countries and their nationals; and

Desiring to promote the economic co-operation between the two countries;

Have agreed as follows:

Article I

1. To the Republic of Korea Japan shall:

(a) Supply the products of Japan and the services of the Japanese people, the total value of which will be so much in yen as shall be equivalent to three hundred million United States dollars ($300,000,000) at present computed at one hundred and eight billion yen (¥108,000,000,000), *in grants* [on a non-repayable basis] within the period of ten years from the date of the entry into force of the present Agreement. The supply of such products and services in each year *shall be limited to* [shall be such] such amount in yen as shall be equivalent to thirty million United States dollars ($30,000,000) at present computed at ten billion eight hundred million yen (¥10,800,000,000); in case the supply of any one year falls short of the set amount, the remainder shall be added to the amounts of the supplies for the next and subsequent years. However, *the ceiling on* the amount

of the supply for any one year can be *raised* [increased] by agreement between the Governments of the Contracting Parties.

(b) Extend long-term and low-interest loans up to such amount in yen as shall be equivalent to two hundred million United States dollars ($200,000,000) at present computed at seventy-two billion yen (¥72,000,000,000), which the Government of the Republic of Korea may request and which shall be used for the procurement by the Republic of Korea of the products of Japan and the services of the Japanese people necessary in implementing the projects to be determined in accordance with arrangements to be concluded under the provisions of paragraph 3 of the present Article, within the period of ten years from the date of the entry into force of the present Agreement. Such loans shall be extended by the Overseas Economic Co-operation Fund of Japan, and the Government of Japan shall take necessary measures in order that the said Fund will be able to secure the necessary funds for implementing the loans evenly each year.

The above-mentioned supply and loans should be such that will be conducive to the economic development of the Republic of Korea.

2. The Governments of the Contracting Parties shall establish, as an organ of consultation between the two Governments with powers to recommend on matters concerning the implementation of the provisions of the present Article, a Joint Committee composed of representatives of the two Governments.

3. The Governments of the Contracting Parties shall conclude necessary arrangements for the implementation of the provisions of the present Article.

Appendix B

Article II

1. The Contracting Parties confirm that [the] problem concerning property, rights and interests of the two Contracting Parties and their nationals (including juridical persons) and concerning claims between the Contracting Parties and their nationals, including those provided for in Article IV, paragraph (a) of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951, is settled completely and finally.

2. The provisions of the present Article shall not affect the following (excluding those subject to the special measures which the respective Contracting Parties have taken by the date of the signing of the present Agreement):

(a) Property, rights and interests of those nationals of either Contracting Party who have ever resided in the other country in the period between August 15, 1947, and the date of the signing of the present Agreement;

(b) Property, rights and interests of either Contracting Party and its nationals, which have been acquired or have come within the jurisdiction of the other Contracting Party in the course of normal contacts on or after August 15, 1945.

3. Subject to the provisions of paragraph 2, no contention shall be made with respect to the measures on property, rights and interests of either Contracting Party and its nationals which are within the jurisdiction of other Contracting Party on the date of the signing of the present Agreement, or with respect to any claims of either Contracting Party and its nationals against the other Contracting Party and its nationals arising from the causes which occurred on or before the said date.

Appendix B

Article III

1. Any dispute between the Contracting Parties concerning the interpretation and implementation of the present Agreement shall be settled, first of all, through diplomatic channels.

2. Any dispute which fails to be settled under the provision of paragraph 1 shall be referred for decision to an arbitration board composed of three arbitrators, one to be appointed by the Government of each Contracting Party within a period of thirty days from the date of receipt by the Government of either Contracting Party from the Government of the other of a note requesting arbitration of the dispute, and the third to be agreed upon by the two arbitrators so chosen within a further period of thirty days or the third arbitrator to be appointed by the government of a third country agreed upon within such further period by the two arbitrators, provided that the third arbitrator shall not be a national of either Contracting Party.

3. If, within the periods respectively referred to, the Government of either Contracting Party fails to appoint an arbitrator, or the third arbitrator or a third country is not agreed upon, the arbitration board shall be composed of the two arbitrators to be designated by each of the governments of the two countries respectively chosen by the Governments of the Contracting Parties within a period of thirty days and the third arbitrator to be designated by the government of a third country to be determined upon consultation between the governments so chosen.

4. The Governments of the Contracting Parties shall abide by any award made by the arbitration board under the provisions of the present Article.

Article IV

The present Agreement shall be ratified. The instruments of ratification shall be exchanged at Seoul as soon as possible. The

present Agreement shall enter into force on the date of the exchange of the instruments of ratification.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed the present Agreement.

DONE in duplicate at Tokyo, in the Japanese and Korean languages, both being equally authentic, this twenty-second day of June of the year one thousand nine hundred and sixty-five.

For Japan:	For the Republic of Korea:
Etsusaburo Shiina	Tong Won Lee
Shinichi Takasugi	Dong Jo Kim

Appendix C

TREATY OF PEACE BETWEEN THE REPUBLIC OF CHINA AND JAPAN

April 28, 1952
Taipei, Taiwan

The Republic of China and Japan,

Considering their mutual desire for good neighborliness in view of their historical and cultural ties and geographical proximity;

Realizing the importance of their close cooperation to the promotion of their common welfare and to the maintenance of international peace and security;

Recognizing the need of a settlement of problems that have arisen as a result of the existence of a state of war between them;

Have resolved to conclude a Treaty of Peace and have accordingly appointed as their Plenipotentiaries,

His Excellency the President of the Republic of China: Mr. Yeh Kung Chao;

The Government of Japan: Mr. Isao Kawada;

Who, having communicated to each other their full powers found to be in good and due form, have agreed upon the following articles:

Appendix C

Article I

The state of war between the Republic of China and Japan is terminated as from the date on which the present Treaty enters into force.

Article II

It is recognized that under Article 2 of the Treaty of Peace with Japan signed at the city of San Francisco in the United States of America on September 8, 1951 (hereinafter referred to as the San Francisco Treaty), Japan has renounced all right, title and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratly Islands and the Paracel Islands.

Article III

The disposition of property of Japan and its nationals in Taiwan (Formosa) and Penghu (the Pescadores), and their claims, including debts, against the authorities of the Republic of China in Taiwan (Formosa) and Penghu (the Pescadores) and the residents thereof, and the disposition in Japan of property of such authorities and residents and their claims, including debts, against Japan and its nationals, shall be the subject of special arrangements between the Government of the Republic of China and the Government of Japan. The terms nationals and residents whenever used in the present Treaty include juridical persons.

Article IV

It is recognized that all treaties, conventions and agreements concluded before December 9, 1941, between China and Japan have become null and void as a consequence of the war.

Article V

It is recognized that under the provisions of Article 10 of the San Francisco Treaty, Japan has renounced all special rights and

its interests in China, including all benefits and privileges resulting from the provisions of the final Protocol signed at Peking on September 7, 1901, and all annexes, notes and documents supplementary thereto, and has agreed to the abrogation in respect to Japan of the said protocol, annexes, notes and documents.

Article VI

(a) The Republic of China and Japan will be guided by the principles of Article 2 of the Charter of the United Nations in their mutual relations.

(b) The Republic of China and Japan will cooperate in accordance with the principles of the Charter of the United Nations and, in particular, will promote their common welfare through friendly cooperation in the economic field.

Article VII

The Republic of China and Japan will endeavor to conclude, as soon as possible, a treaty or agreement to place their trading, maritime and other commercial relations, on a stable and friendly basis.

Article VIII

The Republic of China and Japan will endeavor to conclude, as soon as possible, an agreement relating to civil air transport.

Article IX

The Republic of China and Japan will endeavor to conclude, as soon as possible, an agreement providing for the regulation or limitation of fishing and the conservation and development of fisheries on the high seas.

Appendix C

Article X

For the purposes of the present Treaty, nationals of the Republic of China shall be deemed to include all the inhabitants and former inhabitants of Taiwan (Formosa) and Penghu (the Pescadores) and their descendents who are of the Chinese nationality in accordance with the laws and regulations which have been or may hereafter be enforced by the Republic of China in Taiwan (Formosa) and Penghu (the Pescadores); and juridical persons of the Republic of China shall be deemed to include all those registered under the laws and regulations which have been or may hereafter be enforced by the Republic of China in Taiwan (Formosa) and Penghu (the Pescadores).

Article XI

Unless otherwise provided for in the present Treaty and the documents supplementary thereto, any problem arising between the Republic of China and Japan as a result of the existence of a state of war shall be settled in accordance with the relevant provisions of the San Francisco Treaty.

Article XII

Any dispute that may arise out of the interpretation or application of the present Treaty shall be settled by negotiation or other pacific means.

Article XIII

The present Treaty shall be ratified and the instruments of ratification shall be exchanged at Taipei as soon as possible. The present Treaty shall enter into force as from the date on which such instruments of ratification are exchanged.

Appendix C

Article XIV

The present Treaty shall be in the Chinese, Japanese, and English languages. In case of any divergence of interpretation, the English text shall prevail.

IN WITNESS WHEREOF, the respective Plenipotentiaries have signed the present Treaty and have affixed thereto their seals.

DONE in duplicate at Taipei, this Twenty Eighth day of the Fourth month of the Forty First year of the Republic of China, corresponding to the Twenty Eighth day of the Fourth month of the Twenty Seventh year of Showa of Japan and to the Twenty Eighth day of April in the year One Thousand Nine Hundred and Fifty Two.

For the Republic of China:

Yeh Kung Chao

For Japan:

Isao Kawada

Appendix D

JOINT COMMUNIQUÉ OF THE GOVERNMENT OF JAPAN AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA

September 29, 1972
Peking, People's Republic of China

Prime Minister Kakuei Tanaka of Japan visited the People's Republic of China at the invitation of Premier of the State Council Chou En-lai of the People's Republic of China from September 25 to September 30, 1972. Accompanying Prime Minister Tanaka were Minister for Foreign Affairs Masayoshi Ohira, Chief Cabinet Secretary Susumu Nikaido and other government officials.

Chairman Mao Tse-tung met Prime Minister Kakuei Tanaka on September 27. They had an earnest and friendly conversation.

Prime Minister Tanaka and Minister for Foreign Affairs Ohira had an earnest and frank exchange of views with Premier Chou En-lai and Minister for Foreign Affairs Chi Peng-fei in a friendly atmosphere throughout on the question of the normalization of relations between Japan and China and other problems between the two countries as well as on other matters of interest to both sides, and agreed to issue the following Joint Communiqué of the two Governments:

Japan and China are neighboring countries, separated only by a strip of water with a long history of traditional friendship. The peoples of the two countries earnestly desire to put an end to the abnormal state of affairs that has hitherto existed between the two countries. The realization of the aspiration of the two peoples for the termination of the state of war and the normalization of relations between Japan and China will add a new page to the annals of relations between the two countries.

The Japanese side is keenly conscious of the responsibility for the serious damage that Japan caused in the past to the Chinese

people through war, and deeply reproaches itself. Further, the Japanese side reaffirms its position that it intends to realize the normalization of relations between the two countries from the stand of fully understanding "the three principles for the restoration of relations" put forward by the Government of the People's Republic of China. The Chinese side expresses its welcome for this.

In spite of the differences in their social systems existing between the two countries, the two countries should, and can, establish relations of peace and friendship. The normalization of relations and development of good-neighborly and friendly relations between the two countries are in the interests of the two peoples and will contribute to the relaxation of tension in Asia and peace in the world.

1. The abnormal state of affairs that has hitherto existed between Japan and the People's Republic of China is terminated on the date on which this Joint Communiqué is issued.

2. The Government of Japan recognizes that Government of the People's Republic of China as the sole legal Government of China.

3. The Government of the People's Republic of China reiterates that Taiwan is an inalienable part of the territory of the People's Republic of China. The Government of Japan fully understands and respects this stand of the Government of the People's Republic of China, and it firmly maintains its stand under Article 8 of the Potsdam Proclamation.

4. The Government of Japan and the Government of People's Republic of China have decided to establish diplomatic relations as from September 29, 1972. The two Governments have decided to take all necessary measures for the establishment and the performance of the functions of each other's embassy in their respective capitals in accordance with

international law and practice, and to exchange ambassadors as speedily as possible.

5. The Government of the People's Republic of China declares that in the interest of the friendship between the Chinese and the Japanese peoples, it renounces its demand for war reparation from Japan.

6. The Government of Japan and the Government of the People's Republic of China agree to establish relations of perpetual peace and friendship between the two countries on the basis of the principles of mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit and peaceful co-existence.

The two Governments confirm that, in conformity with the foregoing principles and the principles of the Charter of the United Nations, Japan and China shall in their mutual relations settle all disputes by peaceful means and shall refrain from the use or threat of force.

7. The normalization of relations between Japan and China is not directed against any third country. Neither of the two countries should seek hegemony in the Asia-Pacific region and each is opposed to efforts by any other country or group of countries to establish such hegemony.

8. The Government of Japan and the Government of the People's Republic of China have agreed that, with a view to solidifying and developing the relations of peace and friendship between the two countries, the two Governments will enter into negotiations for the purpose of concluding a treaty of peace and friendship.

9. The Government of Japan and the Government of the People's Republic of China have agreed that, with a view to further promoting relations between the two countries and to

Appendix D

expanding interchanges of people, the two Governments will, as necessary and taking account of the existing non-governmental arrangements, enter into negotiations for the purpose of concluding agreements concerning such matters as trade, shipping, aviation, and fisheries.

Done at Peking, September 29, 1972

Prime Minister of Japan
Minister for Foreign Affairs of Japan

Premier of the State Council of the People's Republic of China
Minister for Foreign Affairs of the People's Republic of China

Appendix E

TREATY OF PEACE AND FRIENDSHIP BETWEEN THE PEOPLE'S REPUBLIC OF CHINA AND JAPAN

August 12, 1978
Peking, People's Republic of China

The People's Republic of China and Japan,

Recalling with satisfaction that since the Government of the People's Republic of China and the Government of Japan issued a Joint Statement in Peking on September 29, 1972, the friendly relations between the two Governments and the peoples of the two countries have developed greatly on a new basis,

Confirming that the above-mentioned Joint Statement constitutes the basis of the relations of peace and friendship between the two countries and that the principles enunciated in the Joint Statement should be strictly observed,

Confirming that the principles of the Charter of the United Nations should be fully respected,

Hoping to contribute to peace and stability in Asia and in the world,

For the purpose of solidifying and developing the relations of peace and friendship between the two countries,

Have resolved to conclude a Treaty of Peace and Friendship and for that purpose have appointed as their Plenipotentiaries:

The People's Republic of China:
Huang Hua, Minister for Foreign Affairs

Japan:
Sunao Sonoda, Minister for Foreign Affairs

Appendix E

Who, having communicated to each other their full powers, found to be in good and due form, have agreed as follows:

Article I

1. The Contracting Parties shall develop durable relations of peace and friendship between the two countries on the basis of the principles of mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit and peaceful coexistence.

2. In keeping with the foregoing principles and the principles of the United Nations Charter, the Contracting Parties affirm that in their mutual relations, all disputes shall be settled by peaceful means without resorting to the use or threat of force.

Article II

The Contracting Parties declare that neither of them should seek hegemony in the Asia-Pacific region or in any other region and that each is opposed to efforts by any other country or group of countries to establish such hegemony.

Article III

The Contracting Parties shall, in a good-neighbourly and friendly spirit and in conformity with the principles of equality and mutual benefit and non-interference in each other's internal affairs, endeavour to further develop economic and cultural relations between the two countries and to promote exchanges between the peoples of the two countries.

Article IV

The present Treaty shall not affect the position of either Contracting Party regarding its relations with third countries.

Appendix E

Article V

1. The present Treaty shall be ratified and shall enter into force on the date of the exchange of instruments of ratification which shall take place at Tokyo. The present Treaty shall remain in force for ten years and thereafter shall continue to be in force until terminated in accordance with the provisions of paragraph 2 of this Article.

2. Either Contracting Party may, by giving one year's written notice to the other Contracting Party, terminate the present Treaty at the end of the initial ten-year period or at any time thereafter.

In witness whereof the respective Plenipotentiaries have signed the present Treaty and have affixed thereto their seals.

Done in duplicate in the Chinese and Japanese languages, both texts being equally authentic, at Peking, this twelfth day of August 1978.

For the People's Republic of China:
Huang Hua

For Japan:
Sunao Sonoda

Appendix F

Nos. 01-17197, 01-17201, 01-17203, 01-17207
01-17211, 01-17243, and 01-17251

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUK YOON KIM, et al.,
Plaintiffs-Appellants,

v.

ISHKAWAJIMA HIRIMA HEAVY INDUS. CO., LTD., et al.,
Defendants-Appellees.

BRIEF FOR AMICUS CURIAE THE UNITED STATES OF AMERICA CONCERNING GROUP 4 IN SUPPORT OF AFFIRMANCE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, THE HONORABLE VAUGHN R. WALKER

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Appendix F

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INTRODUCTION

The Constitution assigns to the Federal Government exclusive responsibility for conducting the nation's foreign policy. At the conclusion of World War II, the President and Senate determined that the United States' interests in security and stability in Asia would be best served by rebuilding Japan into a strong, democratic ally. They recognized that this would not be possible as long as Japan and its industrial base were subject to ongoing compensation claims arising out of the war. At the same time, the United States insisted that Japan pay some compensation for the untold injury it had caused during the war.

Balancing these interests, the Treaty of Peace between the United States, other Allied nations, and Japan, provided for resolution, on a government-to-government basis, of all war related claims and, in return, required Japan to relinquish billions of dollars in foreign assets to those who had suffered at the hands of the Japanese.

Now, half a century after the war's end, the California legislature has adopted a statute that encourages litigation of precisely those claims that the Treaty provided should be resolved by inter-governmental arrangement. California's World War II forced labor statute goes far beyond the State's legitimate domestic interests and interferes in a direct and significant way in matters of foreign relations, undermining in the process long-established federal policy.

BACKGROUND

1. The 1951 Treaty of Peace.

The Treaty of Peace signed on September 8, 1951 between the United States, 47 other Allied powers, and Japan formally concluded World War II with respect to the Pacific Theater. *See* 3 U.S.T. 3169. The Treaty reflects the United States

government's foreign policy determination that all war-related claims against Japan and its nationals — including private claims and including the claims of those whose governments were not party to the Treaty — should be resolved by government-to government agreement rather than litigation.[1]

John Foster Dulles, the United States' principal negotiator, believed that continued demands for war claims compensation would prevent Japan's economic recovery and its development into a reliable democratic ally against communism. The Korean War had begun; communist forces had taken control of the Chinese mainland; and Soviet expansionism was a world-wide threat. Japan was at the center of these geopolitical forces. The United States viewed an economically stable, anti-communist Japan as essential to the United States' interests in the Pacific region. Japan could not play that role if it were subject to continuing war-related claims that might stifle its economy. *See generally* August 2000 Statement, 3-7 [Signatory SER 340-44].

Nor did the United States and the Allies want to repeat the experience of the Versailles Treaty after World War I, which many consider to be one of the root causes of World War II. *See generally id.* at 4-6 [Signatory SER 341-43]. Finally, the United States government, having assumed sole responsibility for Japan's recovery during the occupation of Japan following the war, concluded that any substantial payment of war-related claims ultimately would come out of the pockets of the American taxpayers. *See ibid.* For these reasons, the President, and the Senate in its advise-and-consent role, determined that

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[1] The history of the 1951 Treaty is discussed in much greater detail, with extensive citations to the historical record, in the August 9, 2000, and December 6, 2000, Statements of Interest filed by the United States with the district court. *See* Supplemental Excerpts of Record Concerning Groups 1, 2, & 3 [Signatory SER], 328 ("August 2000 Statement"); Supplemental Excerpts of Record filed in Kim et al [Non-Signatory SER], 498 ("December 2000 Statement").

all claims against Japan and its nationals should be waived in exchange for the forfeiture by Japan and its nationals of their foreign assets.

The Allied nations that are parties to the Treaty, including the United States, expressly waived all claims that they or their nationals might have against Japan and its nationals arising out of the war. Article 14 of the Treaty authorized Allied governments "to seize * * * all property, rights and interests of * * * Japan and Japanese Nationals" located in the Allies' respective jurisdictions in exchange for a commitment by Japan to help rebuild the territory it had occupied and a waiver of claims by Allied governments and their nationals against Japan and Japanese nationals. Art. 14. The waiver provision states:

> Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

Art. 14(b).

In addition to finally resolving the Allies' own war claims and those of their nationals, the Treaty also provided that the war claims of non-signatory countries and their nationals were to be resolved by government-to-government negotiations. These claims, especially those of China and Korea, were extremely large. Japan's infamous conduct in Nanking and its use of Asian slave labor was well documented by the time of the Treaty's negotiation. *See* December 2000 Statement, 4-6 [Non-Signatory SER 507-09]. If left unresolved, these potentially enormous liabilities would likely have prevented Japan's economic recovery. Permitting assertion of these claims would thus have been flatly at odds with one of the chief reasons for the Allies' agreement to waive their own claims and

those of their nationals. *See ibid.* *See also* Memorandum of Conversation, by the Officer in Charge of Korean Affairs (Emmons), Washington, Jan. 17, 1951 (Ex. 8 to the December 2000 Statement) ("any reparations which might be paid to the Koreans by the Japanese would in fact come from the United States taxpayers"). The Allies thus determined that the Treaty should also provide for the resolution of these nonsignatory claims.

Implementing this policy posed significant difficulties. No consensus existed among the Allies as to whether the People's Republic of China ("PRC") or the Republic of China ("Taiwan") legally represented China. Neither could Korea be a party to the Treaty because Korea, as part of the Japanese empire, had fought against the Allies during the Pacific War. As a result of these complications, no Chinese or Korean political entities signed the 1951 Treaty, and Article 14(b)'s waiver provision does not, by its own terms, cover the PRC, Taiwan, or North or South Korea. *See generally* December 2000 Statement 4-6 [Non-Signatory SER 507-09].

To achieve their foreign policy goals, the Allies inserted into the Treaty several other provisions intended to ensure that Chinese and Korean war claims against Japan were also resolved through government-to-government arrangements. Although China and Korea were not signatories, the Treaty provided that China and Korea would receive from Japan the same compensation that the Allies had obtained for themselves in return for waiving their claims. In turn, the Treaty obligated Japan to enter into bilateral agreements with Chinese and Korean representatives on terms similar to those provided in the Treaty.

Article 21 of the Treaty gave China the benefits of Articles 10, in which Japan renounced all rights and interests in China, and 14(a)2, which authorized China to seize and liquidate all assets of Japan and Japanese nationals located in Chinese territory. These provisions were extremely significant to China;

almost half of all Japanese-owned foreign assets were located in China. *See* December 2000 Statement at 4 [Non-Signatory SER 507]. In return, Article 26 provided that Japan was expected to enter into a separate treaty settling the war with a Chinese political entity "*on the same or substantially the same terms as are provided for in the present Treaty.*" Art. 26 (emphasis added). As contemplated by Article 26, a subsequent treaty between Japan and the Republic of China ("Taiwan") states that "property of such authorities and residents [of Taiwan] and their claims against Japan and its nationals, shall be the subject of special arrangements between the Government of the Republic of China and the Government of Japan." *See* Treaty of Peace Between the Republic of China and Japan, April 28, 1952, 1858 U.N.T.S. 38 [Non-Signatory SER .

The Treaty of Peace dealt with Korean war claims against Japan in a similar fashion. Article 21 stated that Korea was entitled to the benefits of Articles 2, 4, 9, and 12 of the Treaty. Article 2 required Japan to recognize Korea's independence and renounce all claims to Korea. Article 4(b), as construed by the United States, gave Korea the same benefits the Allies had obtained for themselves. It authorized the seizure by Korean authorities of all Japanese-owned assets in Korea – assets worth billions of dollars. *See* December 2000 Statement, 8 [Non-Signatory SER 511]. In turn, Article 4(a) provided that the "claims * * * of [Korean] authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and [Korean] authorities."

As contemplated in Article 4(a), Japan and the Republic of Korea ("South Korea") entered into an agreement in 1965, following years of protracted negotiations in which the United States was heavily involved. 8473 U.N.T.S. 258 [Non-Signatory SER, 352]. The terms of this agreement were greatly influenced by the fact that Korea had already received substantial compensation under Article 4(b) of the 1951 Treaty. Article II.1 of the Japan-ROK treaty specifically provides that

the "problem * * * concerning claims between the Contracting Parties and their nationals, including those provided for in Article IV, paragraph (a) of the [1951] Treaty of Peace * * * is settled completely and finally." Non-Signatory SER, 354. A similar agreement between Japan and North Korea is currently under negotiation.

2. California's World War II Forced Labor Statute.

In 1999, California enacted a statute that permits World War II slave and forced laborers to sue the companies that benefited from their labor. *See* Cal. Code of Civ. Pro. § 354.6. The author of the provision, State Senator Tom Hayden, stated at the time of its enactment that the law was intended to "*send[] a very powerful message from California to the U.S. government and the German government,* who are in the midst of rather closed negotiations about a settlement" of World War II-era claims. *See* Henry Weinstein, *Bill Signed Bolstering Holocaust-Era Claims*, Los Angeles Times, July 29, 1999, at A3 (1999 WL 2181642) (emphasis added). The "message," according to Hayden, was that "[i]f the international negotiators want to avoid very expensive litigation by survivors * * *, they ought to settle. Otherwise, this law allows us to go ahead and take them to court." *Ibid.*

The California statute creates a cause of action for victims of slave labor practices of the "Nazi regime, its allies and sympathizers" with uniquely favorable substantive and procedural rules. *See* Cal. Civ. Pro. § 354.6. The statute permits any "prisoner-of-war," "concentration camp" prisoner, or "member of the civilian population conquered by the Nazi regime, its allies or sympathizers," who was forced "to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers," or companies within their jurisdictions, to bring suit to recover the "market value" of the labor they performed. *Ibid.* California has defined the cause of action so as to remove any defense

based on the law of the place where the conduct occurred, *id.* § 354.6(b), affixed damages in a manner to eliminate the effect of post-war inflation, *id.* § 354.6(a)(3), made corporations doing business in California liable for the debts of their Asian and European affiliates, without regard to traditional principles of corporate identity, *id.* § 354.6(b), and set aside generally-applicable statutes of limitations in favor of a limitations period that extends to 2010, *id.* § 354.6(c).

3. Proceedings in the District Court

Plaintiffs are nationals of China and Korea who allege that, during World War II, they were forced by the Japanese government to perform labor for Japanese companies in support of Japan's war effort. *See, e.g.,* Non-Signatory ER 11-25, 43-57, 98-99. Plaintiffs, purporting to represent all similarly situated Korean and Chinese nationals, filed class action suits against the companies for which they were forced to work as well as their American affiliates. Plaintiffs allege claims under California's Section 354.6 as well as common law causes of action. Defendants moved to dismiss, arguing, among other grounds, that plaintiffs' claims present non-justiciable political questions, that the suits are barred by the 1951 Treaty of Peace, and that California's forced labor statute is unconstitutional.

The United States, appearing as amicus curiae, filed a Statement of Interest supporting dismissal. The United States explained that California's forced labor statute frustrates the foreign policy of the United States, established in the 1951 Treaty of Peace, that claims such as plaintiffs' are to be resolved through government-to-government arrangements rather than through litigation.

On September 17, 2001, the district court dismissed plaintiffs' claims. *See In re World War II Era Japanese Forced Labor Litigation,* 164 F. Supp. 2d 1160 (N.D. Cal. 2001). Although the district court found that the Treaty of Peace did

not directly bar plaintiffs' claims, because neither Korea nor China had signed the Treaty, *id.* at 1165-66, the court held that the California legislature had impermissibly attempted to intrude into the conduct of foreign policy when it attempted to create a cause of action for wrongs committed by Japan and its nationals during World War II, *id.* at 1166-78. With respect to plaintiffs' Alien Tort Statute and remaining state-law claims, the court held that, even under the longest statute of limitations that might arguably apply, plaintiffs' claims were time-barred. *Id.* at 1178-83.

SUMMARY OF ARGUMENT

1. The Constitution grants to the Federal Government exclusive authority to conduct the nation's foreign relations, an area that the Framers determined should "be left entirely free from local interference." *Hines v. Davidowitz,* 312 U.S. 52, 63 (1941). The Supreme Court has enforced the constitutional design by striking down state laws that would frustrate the objectives of established federal foreign policy and, even in the absence of federal action, setting aside state regulations that have more than an indirect effect on the nation's foreign relations. Under these precedents, California's policy of promoting litigation of World War II forced labor claims must give way. The State's foreign policy conflicts with the considered judgment of the President and Senate, reflected in the 1951 Treaty of Peace, that such claims against Japanese nationals should be resolved by government-to-government agreement, rather than individual litigation.

2. Section 354.6 also violates additional constitutional limits on the jurisdictional reach of state law. It is an inherent constraint of our federal system of government, reflected in both the Commerce Clause and Due Process Clause of the United States Constitution, that each State may legislate only with respect to matters that take place within its borders. A

contrary view would permit the proliferation of conflicting legal obligations.

California's forced labor statute is a clear example of extraterritorial legislation. The conduct that California seeks to regulate took place exclusively in foreign lands, with no perceptible connection to California. The fact that certain named plaintiffs have subsequently moved to California does not give California the authority to apply its substantive law to events that took place entirely outside the State's boundaries.

The legislation cannot be saved by casting it as a mere "statute of limitations." The structure and language of Section 354.6 betray the State's attempt to define the substantive as well as procedural rules under which the defendants' liability is to be determined.

ARGUMENT

I. THE CONSTITUTION PRECLUDES CALIFORNIA FROM INTERFERING IN THE FEDERAL GOVERNMENT'S DETERMINATION THAT PLAINTIFFS' CLAIMS SHOULD BE RESOLVED THROUGH GOVERNMENT-TO-GOVERNMENT ARRANGEMENTS.

A. The Constitution Vests Full and Exclusive Responsibility For Foreign Relations In The Federal Government.

From the earliest days of the Republic, the Supreme Court has recognized that the Constitution's specific commitment of foreign affairs powers to the national government[2] and the

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[2] The Constitution grants to Congress the authority "[t]o regulate Commerce with foreign Nations," U.S. Const. Art. I, § 8, cl. 3, and "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," *id.*, cl. 10. The Constitution also designates the President as the "Commander in Chief of the Army and Navy of the

express prohibitions on the States' activities in that sphere[3] reflect a general rule of exclusive federal authority over international relations. "Power over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink,* 315 U.S. 203, 233 (1942). *See also Hines v. Davidowitz,* 312 U.S. 52, 63 (1941) (the Federal Government is entrusted "with full and exclusive responsibility for the conduct of affairs with foreign sovereignties"); *United States v. Arjona,* 120 U.S. 479, 487 (1887) (power to define and punish violations of the Law of Nations is "conferred by the constitution on the government of the United States exclusively").

In light of the "imperative[] * * * that federal power in the field affecting foreign relations be left entirely free from local interference," Hines, 312 U.S. at 63, the Supreme Court has held that state "regulations must give way if they impair the effective exercise of the Nation's foreign policy," *Zschernig v. Miller,* 389 U.S. 429, 440 (1968).

United States," *id.*, Art. II, § 2, cl. 1, and gives him the authority to "make Treaties" and "appoint Ambassadors" with the "Advice and Consent of the Senate," *id.*, cl. 2, and to "receive Ambassadors and other public Ministers," *id.*, § 3.

The Constitution also confers upon Congress the authority "[t]o lay and collect * * * Duties, Imposts and Excises," and "provide for the common Defence," U.S. Const. Art. I, § 8, cl. 1, "[t]o establish a uniform Rule of Naturalization," *id.*, cl. 4, "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," *id.*, cl. 11, "[t]o raise and support Armies," *id.* cl. 12, "[t]o provide and maintain a Navy," *id.* cl. 13, and to regulate "the land and naval forces," *id.* cl. 14.

[3] The Constitution provides that "[n]o State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal" or, without the consent of Congress, "lay any Imposts or Duties on Imports or Exports," "keep Troops or Ships of War in time of Peace," "enter into any Agreement or Compact * * * with a foreign Power," or "engage in War, unless actually invaded." U.S. Const. Art. 1, § 10.

Appendix F

Because the conduct of foreign policy is committed to the Federal Government, and because of the unique concerns raised by state action in that arena, federal preemption of a state law concerning foreign affairs may be more readily inferred than in the domestic context where federal and state governments share regulatory authority. When the States act in an area in which federal interests predominate, "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates in a field which the states have traditionally occupied." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988) (quotation omitted). "Preemption of a whole field * * * will be inferred where the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Thus, when a State legislates in an area affecting foreign affairs, the courts are "more ready to conclude that a federal Act * * * supersede[s] state regulation." *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942).

Just as the Supreme Court is more willing to infer affirmative preemption when a state statute intrudes into the foreign policy arena, the Court has also made clear that a state law that directly implicates the conduct of foreign policy will be set aside even if there is no affirmative preemption. In *Zschernig v. Miller*, the Supreme Court made clear that a state policy that disturbs foreign relations must give way "even in [the] absence of a treaty" or federal statute. 389 U.S. at 441. *See also* Laurence H. Tribe, *American Constitutional Law*, § 4-5 at 656 (3d ed. 2000) ("all state action, whether or not consistent with current foreign policy, that distorts the allocation of responsibility to the national government for the conduct of American diplomacy is void as an unconstitutional

infringement on an exclusively federal sphere of responsibility").

The California forced labor statute has far more than an "incidental or indirect effect in foreign countries." *Zschernig*, 389 U.S. at 434-35. Rather, the State has deliberately undertaken the formulation of foreign policy in an area subject to international treaty obligations, adopting a strategy that directly impairs the accomplishment of federal policy and prevents the nation from speaking with one voice on a matter of international concern.

Because the policy reflected in California's forced labor statute is in direct tension with the nation's foreign policy expressed in the 1951 Treaty of Peace, the state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal policy and is, thus, affirmatively preempted. *Hines*, 312 U.S. at 67; *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 373 (2000). However, even if the Court were to conclude that the forced labor statute has not been affirmatively preempted, it is plain that the statute in design and effect impermissibly intrudes into the conduct of foreign affairs and is therefore beyond the authority of the State to enact.

B. Federal Law Preempts California's Forced Labor Statute, Which Stands As An Obstacle To Achieving The United States' Foreign Policy Established In The 1951 Treaty Of Peace.

The 1951 Treaty of Peace reflects the President and Senate's considered judgment that all claims arising out of Japan and Japanese nationals' conduct in the course of World War II, including claims between private individuals, should be resolved through inter-governmental negotiations. The Allied parties to the Treaty, including the United States, expressly "waive all * * * claims of the Allied Powers *and their nationals* arising out of any actions taken by Japan *and its nationals* in the

course of the prosecution of the war." Art. 14(a) (emphasis added). The Treaty of Peace likewise provides that the claims of Korea and China, and those of their nationals, will be resolved through inter-governmental agreements rather than litigation. While the Treaty may not be directly binding on Korea and China, who were not parties to the Treaty, the Treaty does establish the law of the United States with respect to the war-related claims of Korean and Chinese nationals. Indeed, it would be ironic to think that the United States foreclosed the war-related claims of its own nationals while leaving its courts open to litigating the claims of foreign nationals.

As noted above, the Treaty of Peace both ensured for Korea and China the same benefit as the Allied parties had obtained for themselves and directed that war-related claims of Koreans and Chinese, like those of Allied nationals, would be settled on a government-to-government basis. Japan was required to renounce its interests in Korea and China, and the Korean and Chinese authorities were allowed to seize and liquidate all Japanese assets within their territories — assets worth billions of dollars. *See* Art. 4(b) (Korea); Art. 10, 14(a)(2), 21 (China). In return, both Korea and China were expected to settle, as the Allied parties had, the war-related claims of themselves and their nationals against Japan and its nationals. *See* Art. 4(a) ("claims * * * of [Korean] authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and [Korean] authorities"); Art. 26 (providing that Japan was to enter a peace treaty with China, settling the war "*on the same or substantially the same terms as are provided for in the present Treaty*" (emphasis added)).

California's forced labor statute runs directly contrary to the United States' foreign policy of relegating the war-related claims of Korean and Chinese nationals to inter-governmental resolution. Whereas federal law provides that the claims of Korean and Chinese nationals, like those of Americans themselves, are to be resolved by government-to-government

settlements, the California statute grants such claims a preferred status, with uniquely favorable substantive and procedural rules. *See, e.g.*, Cal. Code Civ. Pro. § 354.6(a)(3) (affixing damages in a manner to eliminate the effect of post-war inflation), § 354.6(b) (making corporations doing business in California liable for the debts of their Japanese affiliates, without regard to traditional principles of corporate identity), § 354.6(c) (setting aside generally-applicable statutes of limitations in favor of an 81-year limitations period).

The district court mistakenly believed that the federal Treaty could preempt the California statute with respect to plaintiffs' claims only if the Treaty itself actually resolved the Korean and Chinese claims. *See In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1165-68 (N.D. Cal. 2001). Thus, the district court found it conclusive that the Treaty itself did not "waive the claims of the Korean and Chinese plaintiffs." *Id.* at 1165. *See also id.* at 1168 (Treaty does not "control claims of individuals from non-signatory nations"). This misconceives the nature of both the Treaty and federal preemption. It is not necessary for the Treaty to finally resolve plaintiffs' claim in order for the federal law to preempt California's attempt to encourage litigation of those claims. It is sufficient that the Treaty establishes, as a matter of United States law, that plaintiffs' claims are to be resolved by inter-governmental arrangements, rather than litigation. It is irrelevant, therefore, whether, as a matter of Korean or Chinese law, plaintiffs could pursue their claims in the courts of those nations; they may not, consistent with the United States' policy adopted in the Treaty, pursue their claims in the courts of the United States. The California statute plainly "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Treaty. *Hines*, 312 U.S. at 61; *Crosby*, 520 U.S. at 373-77 & n.10 (rejecting as "cramped," Massachusetts' argument that the Federal Burma Act had given the President had flexibility over *federal* sanctions but "implicitly left control over state sanctions to the State").

C. Even if Not Affirmatively Preempted, the California Forced Labor Statute Is an Unconstitutional Intrusion Into the Conduct of Foreign Affairs.

The Supreme Court has established that, even apart from statutory preemption, the Constitution's commitment to the Federal Government of the exclusive responsibility for conducting the nation's foreign affairs acts as an independent constraint on state activity. Thus, "even in [the] absence of a treaty" or federal statute, a state policy that disturbs foreign relations must be set aside. *Zschernig*, 389 U.S. at 441. *See also Chy Lung v. Freeman,* 92 U.S. 275 (1875) (striking down California statute requiring ship to post bond for certain foreign immigrants without finding conflict with any federal statute or treaty). It is not a question of "balanc[ing] the nation's interest in a uniform foreign policy against the particular interests of a particular state"; rather, "there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed." *National Foreign Trade Council v. Natsios,* 181 F.3d 38, 52 (1st Cir. 1999), *aff'd*, 530 U.S. 363 (2000).

Zschernig is illustrative. In that case, the Supreme Court struck down an Oregon probate law that prevented the distribution of estates to foreign heirs if, under foreign law, the proceeds of the estate were subject to confiscation. 389 U.S. at 431. The Court noted that application of the statute required state courts to engage in "minute inquiries concerning the actual administration of foreign law" and to judge the credibility and good faith of foreign counsels, *id.* at 435, with outcomes turning upon "foreign policy attitudes" regarding the Cold War, *id.* at 437. Accordingly, the Court concluded that the statute had "a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems." *Id.* at 441. The Court held that this "kind of state involvement in foreign affairs and international relations — matters which the Constitution entrusts solely to the Federal Government" — was "forbidden state activity." *Id.* at 436.

Appendix F

The California forced labor statute represents a similar impermissible intrusion into the Federal Government's authority to regulate foreign affairs. California is plainly of the view that Japanese companies' use of unpaid forced labor, even if condoned by the Imperial Japanese government, violated principles of international human rights law. But under our constitutional scheme, only the Federal Government has the authority to prescribe penalties for foreign violations of international law. *See* U.S. Const. Art. 1, § 8, cl. 10; *United States v. Arjona,* 120 U.S. 479, 487 (1887).

This is particularly so where, as here, the international law violations at issue were committed in conjunction with a foreign government during the course of a war against the United States. As the Supreme Court has recognized, war-related claims, including the claims of nationals, are frequently the subject of government-to-government negotiations at the conclusion of hostilities. *See, e.g., United States v. The Schooner Peggy,* 5 U.S. (1 Cranch) 103 (1801) (upholding the Federal Government's power to abolish, by way of treaty, private prize claims against foreign property); *Ware v. Hylton,* 3 U.S. (3 Dall.) 199, 230 (1796) (refusing to adjudicate a personal debt, confiscated by Virginia during the Revolutionary War, because the treaty of peace concluding the war had not provided for such claims). The decision whether to risk continued animosity with a foreign power by creating claims in American courts arising out of foreign nationals' participation in their government's atrocities is a determination that only the Federal Government is authorized to make. *See Pink*, 315 U.S. at 225 (noting that "the existence of unpaid claims against Russia *and its nationals* which were held in this country * * * had long been one impediment to resumption of friendly relations between these two great powers" (emphasis added)).

Even a State with the best of intentions lacks the resources and breadth of view necessary to assess the impact of punishing particular international law violations on the United States'

multi-faceted international interests. *See, e.g., Crosby v. National Foreign Trade Council,* 530 U.S. 363, 381-82 (2000) (observing that independent state activity would undermine President's ability to coordinate the country's multi-pronged policy of encouraging democratic change in Burma through enticements, threats, and cooperation with other foreign nations). A state legislature is in a poor position to assess what risks to our relations with Germany and Japan are entailed by a statute that aims to redress the wrongs of World War II, or to weigh those risks against other foreign policy objectives that depend upon the good will of those governments. The interests of the nation as a whole should not be made dependent upon the judgment of any one State which lacks both the responsibility and the capacity to formulate foreign policy.

Plainly, the California legislature has engaged in a policy-oriented balancing of interests and decided that the benefits of adopting a law with respect to German and Japanese forced labor claims were worth the risks entailed in antagonizing the target companies and the German and Japanese governments. As to the States, such foreign policy debates are "forbidden activity." *Zschernig*, 389 U.S. at 435-36.[4] Like other state statutes that have been held invalid under *Zschernig*, this statute

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[4] At the time of the bill's signing, the provision's author made clear that the statute was intended to influence the conduct of the United States and German governments in their discussions relating to Holocaust-era claims:

> [Section 354.6] *sends a very powerful message from California to the U.S. government and the German government,* who are in the midst of rather closed negotiations about a settlement. * * * If the international negotiators want to avoid very expensive litigation by survivors * * *, they ought to settle. * * * Otherwise, this law allows us to go ahead and take them to court.
>
> *See* Henry Weinstein, *Bill Signed Bolstering Holocaust-Era Claims*, Los Angeles Times, July 29, 1999, at A3 (1999 WL 2181642) (emphasis added).

unacceptably compromises the nation's interest in having its foreign policy conducted by a national government responsible to the citizens of all states. *See Natsios,* 181 F.3d at 53 (Massachusetts statute restricting the ability of state agencies to purchase goods or services from companies that also did business in Burma was specifically designed to affect the affairs of a foreign country); *Miami Light Project v. Miami-Dade County,* 97 F. Supp. 2d 1174, 1176-77, 1180 (S.D. Fla. 2000) (by requiring public contractors to certify that neither they nor their subcontractors had engaged in commerce with Cuba, Cuban products or Cuban nationals, county had impermissibly inserted itself into a "hotbed of foreign affairs" with the intent to "protest and condemn Cuba's totalitarian regime"); *Tayyari v. New Mexico State Univ.,* 495 F. Supp. 1365, 1376-80 (1980) (state university's policy of denying admission to Iranian students in retaliation for the Iranian hostage crisis intruded upon "the arenas of foreign affairs and immigration policy, interrelated matters entrusted exclusively to the federal government"); *Springfield Rare Coin Galleries, Inc. v. Johnson,* 503 N.E.2d 300, 302-03 (Ill. 1986) (state law regarding the sale of South African coins was unconstitutional where adopted "as an expression of disapproval of that nation's policies"); *New York Times Co. v. City of New York Comm'n on Human Rights,* 361 N.E.2d 963, 968 (N.Y. 1977) (striking down prohibition on advertising jobs in South Africa as an impermissible intrusion upon foreign relations). *Compare Trojan Technologies, Inc. v. Pennsylvania,* 916 F.2d 903, 913-14 (3d Cir. 1990) (upholding state "Buy America" statute in part because the law did not involve evaluation of specific foreign nations), *cert. denied,* 501 U.S. 1212 (1991).

Further, as with the Massachusetts Burma statute, the potential foreign policy impact of California's forced labor statute must be assessed within the "broader pattern of state and local intrusion." *Natsios,* 181 F.3d at 53. If California is free to redress the wrongs associated with forced labor during World War II, then each State is free to adopt similar — or even

inconsistent — laws relating to their preferred foreign human rights issue, whether it be repression in Burma, *cf. Natsios*, 181 F.3d at 53, or communism in Cuba, *cf. Miami Light Project,* 97 F. Supp. 2d at 1180. In addition to violating the territorial limitations on state jurisdiction, discussed below, such a rule would severely undermine American foreign policy. Individual States cannot be permitted to force their favored issues or preferred resolutions into the Federal Government's diplomacy. *See Crosby*, 530 U.S. at 382-83 (observing that Massachusetts had undermined federal policy toward Burma by making the state law the focus of diplomacy, rather than Burma's conduct).

As discussed above, the conflict with federal policy in this case is real and direct. The Federal Government made the determination at the conclusion of World War II that the nation's strategic need for a strong, democratic ally against communism in Asia required that claims against Japan and Japanese companies be resolved finally through inter-governmental negotiations. Thus, the Allies, including the United States, foreclosed litigation of their nationals' war-related claims in exchange for the right to confiscate and distribute Japanese assets within their territory. The Allies directed that the claims of Korean and Chinese nationals be dealt with similarly. California's forced labor statute moves in precisely the opposite direction, encouraging and facilitating litigation of the exact claims that the federal policy seeks to bar.

Actual adjudication of plaintiffs' claims would draw the courts even deeper into the terrain of foreign affairs. The court would be called upon to adjudicate whether Japan's bilateral treaties with South Korea and the Republic of China do, in fact, resolve plaintiffs' legal claims. If the parties to those agreements disagree on their meaning, a court ruling either way might well inflame simmering international disputes. Moreover, a finding that the treaties had not finally resolved those claims would be equivalent to a determination that Japan violated its obligations under the terms of the 1951 Treaty of

Peace. An individual state legislature cannot interject its courts into such foreign policy thickets. *See Zschernig*, 389 U.S. at 435-37.

Plaintiffs mistakenly contend that this Court's opinion in *Gerling Global Reins. Corp. of America v. Low,* 240 F.3d 739 (9th Cir. 2001) ("*Gerling-Low*") controls the foreign affairs analysis in this case. As the district court explained, the *Gerling-Low* decision turned on factors that, in this case, require dismissal of plaintiffs' claims. In *Gerling-Low*, the Court found that the disclosure provisions of the HVIRA were related to the State's *domestic* interest in monitoring the bona fides of insurance companies doing business in the State. 240 F.3d at 744-45. A disclosure requirement alone, the Court stated, would not affect the "decision making authority" of insurance companies "to pay or not to pay claims." *Ibid.* Moreover, Congress had, in the Court's view, "expressly delegated to the states the power to regulate insurance," *id.* at 744-46 (citing the McCarran-Ferguson Act), and had even "embrace[d] state legislation like HVIRA," *id.* at 748 (citing the U.S. Holocaust Assets Commission Act of 1988).

The California forced labor statute, in contrast, is an attempt to force foreign companies and their affiliates to pay damages, according to a formula determined by the California legislature, for wrongs committed in foreign lands.[5] Federal policy is precisely to the contrary. Thus, the forced labor statute is quite distinct from the HVIRA, as construed by the Court, and more akin to those provisions of California insurance law that the Court specifically declined to address in the *Gerling-Low* decision. *See* 240 F.3d at 745 (reserving "for another day" consideration of the constitutionality of California Ins. Code

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[5] As described further below, *infra* at 31, plaintiffs' and the State of California's characterization of Section 354.6 as merely a "statute of limitations" cannot be squared with the provision's language.

§ 790.15, which authorizes license suspensions of insurance companies who have not paid Holocaust-era claims, and Cal. Civ. Proc. Code § 354.5, which allows claims for payment on Holocaust-era insurance policies issued in Europe).

Plaintiffs would construe the *Gerling-Low* ruling so broadly as to overturn the Supreme Court's *Zschernig* decision. In plaintiffs' view, the *Gerling-Low* court held *Zschernig* inapplicable wherever the defendants are simply businesses and no foreign government has been named as a defendant, and where the statute at issue is not directed at a particular country. *See* Kim Br. at 25. Under this construction, the *Gerling-Low* opinion necessarily overruled the holding in *Zschernig* because no foreign government was a party to the litigation in Zschernig, and the statutes there at issue were not, on their face, directed at any particular country. *See Zschernig*, 389 U.S. at 430, 432.[6] Plainly, this Court did not purport to overrule Supreme Court precedent. *See Agostini v. Felton,* 521 U.S. 203, 237 (1997); *United States v. Pacheco-Zepeda,* 234 F.3d 411, 414 (9th Cir. 2000).

II. THE CALIFORNIA WORLD WAR II FORCED LABOR STATUTE IS EXTRATERRITORIAL LEGISLATION THAT IS BEYOND THE AUTHORITY OF THE STATE TO ENACT.

In addition to Section 354.6's impermissible interference with federal foreign policy, the state statute also violates the federal Constitution's prohibition on States attempting to project their legislative jurisdiction beyond their borders.

A. The Commerce Clause of the federal Constitution "has long been understood" not only as an affirmative grant of authority to the Federal Government, but as a constraint upon

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[6] Even if this were the test, Section 354.6 is, in fact, expressly directed at particular foreign countries: "Nazi [Germany], its allies or sympathizers."

the power of the States, which "'provide[s] protection from state legislation inimical to the national commerce [even] where Congress has not acted.'" *Barclays Bank PLC v. Franchise Tax Board,* 512 U.S. 298, 310 (1994) (quoting *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 769 (1945)).

As the Supreme Court has explained, the Commerce Clause precludes a State from applying its law "to commerce that takes place wholly outside of the State's borders." *Edgar v. MITE Corp.,* 457 U.S. 624, 642-43 (1982) (plurality opinion). *See also BMW of North America, Inc. v. Gore,* 517 U.S. 559, 572 (1996) (State may not "impose economic sanctions on violators of its laws with the intent of changing the [violator's] lawful conduct in other States"). Extraterritorial regulation "exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy v. Beer Institute,* 491 U.S. 324, 336 (1989).

These principles apply with particular force in the international arena, and the Supreme Court has recognized that the dormant Foreign Commerce Clause prevents States from regulating commerce in a manner that "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 451 (1979) (quoting *Michelin Tire Corp. v. Wages,* 423 U.S. 276, 285 (1976)). A state statute "will violate the 'one voice' standard if it *either* implicates foreign policy issues which must be left to the Federal Government or violates a clear federal directive." *Container Corp. v. Franchise Tax Bd.,* 463 U.S. 159, 194 (1983)

Similar principles, inherent in the constitutional requirement of due process, also limit a State's ability to project its law beyond its borders. *See Allstate Ins. Co. v. Hague,* 449 U.S. 302, 310-11 (1981) (plurality) ("if a State has only an insignificant contact with the parties and the occurrence or

transaction, application of its law is unconstitutional"); *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 818 (1985); *Home Insurance Co. v. Dick,* 281 U.S. 397, 407-08 (1930). *See also Quill Corp. v. North Dakota,* 504 U.S. 298, 306 (1992) ("[t]he Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax'" (citation omitted)). The due process limitations on a State's extraterritorial legislation look "not only at whether the *parties* * * * have contacts with [the State], but also and more importantly * * * at whether the subject [of the legislation] has a sufficient nexus to [the State]." *Gerling Global Reinsurance Corp. of America v. Gallagher,* 267 F.3d 1228, 1238 (11th Cir. 2001) ("*Gerling-Gallagher*").

Applying these principles, the Eleventh Circuit in *Gerling-Gallagher* recently enjoined application of a Florida statute that attempted to force European insurance companies and their Florida affiliates to pay on insurance policies issued in Europe prior to and during World War II. *See Gerling-Gallagher,* 267 F.3d at 1238. The court explained it was insufficient that, subsequent to the Holocaust, some victims had moved to Florida or that affiliates of the European insurers did business in Florida. *Ibid.* The State lacked a sufficient nexus to "the *subject*" of the legislation - "the German affiliates' payment or non-payment of Holocaust-era policy claims." *Ibid.*

B. In enacting its Second World War forced labor statute, the California legislature sought to create and define a cause of action to provide compensation for victims of German and Japanese forced labor practices during World War II. Section 354.6 establishes the cause of action, Cal. Civ. Pro. § 354.6(b), defines the class of plaintiffs who may sue, *id.* § 354.6(a)(1), (2), affixes the measure of damages (eliminating the effect of post-war inflation), *id.* § 354.6(a)(3), makes corporations doing business in California liable for the debts of their Asian and European affiliates, without regard to traditional principles of corporate identity, *id.* § 354.6(b), and sets aside generally-

applicable statutes of limitations, substituting an 81-year statute of limitations that extends to 2010, *id.* § 354.6(c).

Contrary to plaintiffs' and the California Attorney General's suggestion, the statute thus is considerably more than a state "statute of limitations." Indeed, the paragraph that establishes the limitations period expressly disavows any general application to causes of action that arise under other provisions of substantive law. To the contrary, the limitations provision applies only to "[a]ny action *brought under this section.*" *Id.* § 354.6(c) (emphasis added).

The principles outlined above plainly preclude this extraterritorial legislation. As noted, both the "dormant" Commerce Clause and the Due Process Clause prohibit a State from projecting its laws into other jurisdictions. *See Healy v. Beer Institute,* 491 U.S. 324, 336 (1989) (Commerce Clause); *Home Insurance Co. v. Dick,* 281 U.S. 397, 407-08 (1930) (Due Process Clause). The California legislature can no more regulate conduct that takes place in Asia or legislate what damages should be paid for such conduct, than it can impose its regulatory policies on New York.

Section 354.6 applies to conduct in territory "conquered by the Nazi regime, its allies or sympathizers" at any time during World War II. *See* Cal. Civ. Pro. § 354.6(a)(2). By definition, therefore, the statute applies only to conduct that occurred outside of California. Nor does the statute represent an attempt to afford protection to California citizens victimized in foreign nations. The statute seeks to provide relief to persons "taken from a concentration camp or ghetto" in Europe, or "member[s] of the civilian population[s] conquered by the Nazi regime, its allies or sympathizers." *Id.* § 354.6(a). Indeed, with respect to claims concerning the Pacific Theater, the *only conceivable* plaintiffs are individuals who were not nationals of the United States in 1951, when the United States explicitly waived all such claims. Although some of the named plaintiffs may subsequently have moved to California, it is well-established

that the mere presence of the parties in a State is not an adequate basis for that State to apply its substantive law to activity with no other significant contact with the State. *Allstate Ins. Co.*, 449 U.S. at 310-11 (citing *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936)).

C. Plaintiffs cannot avoid the territorial limitations of the Commerce and Due Process Clauses by arguing that Section 354.6 merely authorizes suit against conduct that violated universal norms of international law. *Cf.* Kim Br. at 36-38. As discussed above, the authority to "define and punish Offences against the Law of Nations," U.S. Const. Art. I, § 8, cl. 10, is "conferred by the constitution on the government of the United States exclusively." *United States v. Arjona*, 120 U.S. 479, 487 (1887).[7] Thus, it is beyond the authority of the California legislature to provide redress for violations of international law beyond what remedies might be provided by federal law. *See also* The Federalist, No. 3 (Jay) (Rossiter ed. 1961) 43 (in contrast to the Articles of Confederation, where each State had independent authority to adjudicate points of international law, "[u]nder the national government, * * * the laws of nations will always be expounded in one sense and executed in the same manner").

Plaintiffs' reliance on the history of state courts exercising jurisdiction over "transitory" torts, *cf.* Kim Br. at 33-34, is misplaced. As the Second Circuit explained in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), upon which plaintiffs rely, a state court may provide a remedy for foreign conduct only "as long as the conduct complained of was unlawful where performed," *id.* at 885. *See also ibid.* (exercise of jurisdiction over transitory torts "is an expression of comity to give effect to

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[7] Of course, the States retain jurisdiction to prescribe and punish conduct that occurs in their own territory that might also violate international law. *See Arjona*, 120 U.S. at 487.

the laws of the state where the wrong occurred"). Here, in contrast, plaintiffs' Complaints acknowledge the full cooperation and involvement of the Imperial Japanese government in defendants' alleged conduct. *See, e.g.*, ER 12, 43-44, 98.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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IN THE

Supreme Court of the United States

DO GEUN OH, *et al.*,

Petitioners,

v.

MITSUI & CO., LTD., *et al.*,

Respondents.

SUK YOON KIM, on behalf of himself and all others similarly situated,

Petitioner,

v.

ISHIKAWAJIMA HARIMA HEAVY INDUSTRIES, LTD., *et al.*,

Respondents.

SA SON SIN,

Petitioner,

v.

MITSUI & CO., LTD., *et al.*,

Respondents.

JAE SIK CHOE,

Petitioner,

v.

NIPPON STEEL CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

The centuries-old doctrine, affirmed and refined in June by this Court in *Garamendi*,[1] for determining when federal foreign-affairs powers preempt a state-law claim hinges on finding a conflict between the state-law claim and a federal international agreement. But the Ninth Circuit decision disregarded this time-honored preemption doctrine, creating instead a novel and competing rule that ignores federal/state conflict while preempting any state-law claim that somehow "relates to war." Petitioners asked this Court to review that decision and conform it to the established foreign-affairs doctrine.

Respondents dispute none of this – nor say much at all about the Ninth Circuit decision and the primary grounds for review. They do not dispute that the Ninth Circuit conjured a novel rule of law that displaces the established standard described and refined in *Garamendi*. Nor do they challenge that courts within the Ninth Circuit will be forced to employ this competing rule, and courts elsewhere will be free to use it – and disregard *Garamendi*. They are silent to the fact that neither decision explains when its rule should supersede the other. Respondents thus can little contest that this Court should grant the petition to conform the Ninth Circuit's rogue preemption rule to *Garamendi*.

Respondents instead argue, in essence, that the Ninth Circuit's error is harmless because applying *Garamendi* to petitioners' claims would produce the same result. But respondents are wrong. To the extent the Ninth Circuit decision can be read to invoke field preemption, as respondents seem to argue, *Garamendi* does not adopt that as an alterative preemption test. The Court instead embraced conflict preemption and did not rule on any alternative test. Moreover, the four-justice dissent

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1. *Am. Ins. Ass'n v. Garamendi*, __ U.S. __, 156 L. Ed. 2d 376, 123 S. Ct. 2374 (2003).

made clear its view that foreign-affairs preemption requires an explicit conflict – and that nothing less would do.

Nor is there any conflict here between a federal agreement and state law, as there was in *Garamendi*. As both lower courts agreed, these petitioners' state-law claims present no conflict with federal foreign-affairs powers that could trigger preemption for the simple reason that no U.S. treaty or other federal action governs these petitioners' claims against the private corporate defendants.

ARGUMENT

A. *Garamendi* Does Not Cure The Ninth Circuit's Error

Respondents say little about the Ninth Circuit decision at issue here, citing instead only the occasional snippet from it. And to the extent respondents refer to the decision at all, they rewrite it and *Garamendi* as well in an effort to contrive some consistency.

But the decisions are contrary. As petitioners already established, the Ninth Circuit explicitly declined to decide the appeal under the foreign-affairs doctrine. Rather, the court was clear that its novel preemption rule was an ***alternative*** analysis. After describing the conventional doctrine, the court then declined to apply it, stating:

> Although we agree that [§] 354.6 violates the foreign affairs power, we base our holding on a narrower consideration. [Apdx. A at 23a.]

The court went on to fabricate its all-things-related-to-war preemption rule, making no effort to link it to existing foreign-affairs preemption analysis. Rather, the court designated far-reaching categories of matters as "relating to war" – including even the cold-war inheritance statute at issue in *Zschernig v. Miller*, 389 U.S. 429 (1968), *see* Apdx. A at 21a-22a – and then ruled that these matters are categorically off limits for states.

Apdx. A at 22a. The Ninth Circuit thus did not base its decision on any existing facet of the foreign-affairs doctrine.

Tellingly, beyond twisting the Ninth Circuit's related-to-war preemption rule into something it was not, respondents do little to defend it. Instead they respond to the petition for review by discussing *Garamendi* and asserting other, extraneous arguments that, respondents assert, offer alternative grounds for dismissing petitioners' claims. Although respondents ignore the Ninth Circuit's analysis, this Court should not. As petitioners anticipated (*see* Pet. at 29-30), *Garamendi* did not address the Ninth Circuit's all-things-related-to-war rule, thereby leaving courts within the Ninth Circuit obliged to apply this new rule as an alternative and competing preemption standard unencumbered by *Garamendi*. But the Ninth Circuit decision should not displace *Garamendi*. It thus merits the Court's full review.

Moreover, no one – and certainly not respondents – disputes the atrocities that petitioners and other forced-labor victims endured at the hands of respondents or their affiliates more than 50 years ago. No one disputes that the corporate perpetrators have not paid a penny of compensation nor offered the slightest apology to petitioners and other forced-labor victims. And no one disputes that California's § 354.6 offers petitioners and other victims their last opportunity to obtain some relief. The Ninth Circuit devised an erroneous rule of law to affirm dismissal of their claims. Not only must that rule not be allowed to challenge the correct rule set forth in *Garamendi*, but it also should not be permitted to deny justice to respondents' aging victims. Petitioners therefore ask the Court to accept review.

B. *Garamendi* Did Not Adopt Field Preemption As An Alternate Foreign-Affairs Test

Respondents pin their opposition partly on the contention that *Garamendi* recognized field preemption as a test of the foreign-affairs doctrine. But *Garamendi* did not do so. Rather, central to the *Garamendi* preemption analysis was the conflict between Californian and federal efforts to address the same matters. The result hinged on the finding of a direct conflict between a federal agreement and state law:

> . . . we think petitioners and the Government have demonstrated a sufficiently clear conflict to require finding preemption here. [123 S. Ct. at 2390.]

By adopting conflict preemption as the test under the foreign-affairs doctrine, *Garamendi* did not require nor provide a ruling on field preemption. 123 S. Ct. at 2389 ("but the question requires no answer here"). Further, the four-justice dissent squarely rejected field preemption in this arena. *Id.* at 2401 ("courts step out of their proper role when they rely on no legislative or even executive text, but only on inference and implication, to preempt state laws on foreign affairs grounds"); *see also id.* at 2399-2400.

Accordingly, notwithstanding respondents' wistful argument, *Garamendi* did not append field preemption to the foreign-affairs doctrine. Preemption under *Garamendi* requires a conflict, and there is none here. And to the extent the Ninth Circuit decision can be read to invoke a form of field preemption, *Garamendi* provides scant support for such a rule of law. Four justices of this Court plainly rejected it and the majority did not address it. As an alternative basis for review, however, this Court should accept review to resolve the question left unanswered in *Garamendi* – whether field preemption is a separate and independent component of the foreign-affairs doctrine.

C. *Garamendi* Confirms That Federal Power Over Foreign Affairs Does Not Bar Petitioners' Claims

Respondents also appear to contend that the Court should deny review because the Ninth Circuit's error was harmless, as petitioners' claims would, according to respondents, be dismissed under *Garamendi*'s conflict preemption test. But petitioners' state-law claims would survive under *Garamendi* because they are distinguishable from the claims at issue there. Respondents' purported "correct result" argument is thus misplaced and offers no reason to deny review.

1. There is no conflict here because no U.S. treaty bars these petitioners' claims

As just shown, *Garamendi* required proof of a conflict between state and federal actions to trigger preemption under for foreign-affairs doctrine. There, the federal government had negotiated with several European governments and insurance companies mechanisms for disclosing potential claims arising from the denial of insurance benefits to Holocaust victims or their descendents and to resolve these claims. Meanwhile, the state of California enacted a law establishing an alternative means to address the same issues. The majority in *Garamendi* found that the California statute at issue "undercuts the President's diplomatic discretion and the choice he has made exercising it," so that it "threatens to frustrate the operation of the particular mechanism the President has chosen." 123 S. Ct. at 2391, 2392. The majority viewed the state statute as "thwarting the Government's policy of repose" and placing "a handicap" on the effectiveness of the Government's chosen mechanism. *Id.* at 2392. The statute thus was "an obstacle" to the Government's policy choice. To the majority, the conflict was clear.[2]

2. Four justices dissented. They agreed with the majority that preemption required conflict between state and federal approaches, but

(Cont'd)

But there is no corresponding conflict here. No U.S. treaty or other international agreement governs petitioners' claims. Rejecting the same argument that respondents assert here, the district court below explicitly found that the only possibly relevant U.S. treaty, the multilateral Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, did not address tort and contract claims brought by these petitioners. The court hence ruled that § 354.6 "does not conflict with the expressed intent of the treaty. Accordingly, the treaty itself does not trump the California law in this respect." Apdx. B at 52a. The Ninth Circuit did not disagree, noting correctly that Korea and China "were not signatories of the San Francisco treaty." Apdx. A at 28a n.14.[3]

These courts rejected respondents' treaty-conflict argument for good reason. Respondents overlook here – as they did below – that the 1951 treaty expressly excluded Korea (and China) from the definition of "Allied Powers." *See* Respondents' Br. at 2a-3a (Articles 2(a) and 4(a)); *see also id.* at 18a-19a (Articles 23a and 25). As the district court found, when the treaty's Article 14(b) waived "reparations claims of the Allied Powers" arising from "prosecution of the war" (*id.* at 12a-13a), the waiver thus had "no effect on the claims of nationals from non-signatory nations." Apdx. B at 50a. The district court properly concluded that the 1951 treaty's text demonstrated the United States' intent ***not*** to resolve Korean nationals' individual claims:

(Cont'd)

differed as to the requisite degree. The dissent would require direct conflict between the state law and a formal federal international agreement. *Id.* at 2395, 2399 (Ginsburg, J., dissenting).

3. The Ninth Circuit found the treaty pertinent, not for whether it addressed claims of Korean nationals (or anyone else, for that matter), but instead because it did not affirmatively authorize "a private right of action against Japan or its nationals, or authorize[] states of the United States to create such a right." Apdx. A at 27a.

> The court reads the language of articles 4(a) and 26 to suggest only that the signatory nations, including the federal government of the United States, did not intend the Treaty of Peace with Japan to control claims of individuals from non-signatory nations. [*Id.* at 52a.]

Respondents had argued that Article 26 of the treaty, which provides "Japan will be prepared to conclude with any State . . . which is not a signatory of the present Treaty, a bilateral Treaty of Peace on the same . . . terms as are provided for in the present Treaty" (Respondents' Br. at 19a-20a), proves otherwise. This clause obligated Japan to agree to terms with other nations desiring to enter such treaties that would be as least as favorable as the 1951 treaty terms. But Article 26 was silent to Korean citizens' tort and contract claims against private corporations. And it certainly did not oblige the government of Korea to negotiate on the matter – nor agree to bar its own nationals' claims for wartime injuries.

Respondents also urged that the Allied Powers eliminated Korean nationals' ability to pursue claims against Japanese companies for wartime misconduct in Article 4(a) of the 1951 treaty. But Article 4(a) did nothing of the sort. It instead compelled Japan to deal with the "authorities presently administering such areas" identified in Article 2 over which Imperial Japan previously asserted sovereignty but now "renounce[d] all right, title and claim." Respondents' Br. at 2a-3a. Those former colonies and territories included Korea. *Id.* at 2a.

Further, the Allied Powers simply did not represent those regions' residents, and thus Article 4(a) left the disposition "in Japan of property of such authorities and residents, and of claims, including debts, of such authorities and residents against Japan and its nationals" to "special arrangements between Japan and

such authorities." *Id.* at 3a. The treaty accordingly required Japan to recognize "such authorities" that governed Japan's former territories. But Article 4(a) did not require any of those authorities to waive their citizens' claims stemming from war-era violations.

In short, as the district court concluded and the Ninth Circuit did not disagree, the 1951 treaty reflects that Korea was not a signatory and the Allied Powers did not represent its residents. No court should rewrite the treaty to bar assertion of Korean nationals' claims. *See generally Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 135 (1989) ("[t]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions"; citations and internal quotation marks omitted). *United States v. Alvarez-Machain*, 504 U.S. 655, 665-66 (1992) (refusing to imply terms into treaty). The treaty thus does not govern nor conflict with petitioners' tort and contract claims asserted under § 354.6.

2. Section 354.6 is a proper exercise of California's state interest

The state's interest in the matter is a counterbalance in *Garamendi*'s conflict analysis. Here, Congress and the Constitution allocated to the states jurisdiction over transitory actions for private wrongs sounding in tort and contract law:

> Each state may, subject to the restrictions of the Federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and specifically how far it will, having jurisdiction of the parties, entertain in its courts transitory actions where the cause of action has arisen outside its borders. [*St. Louis, I. M. & S. Ry. Co. v. Taylor*, 210 U.S. 281, 285 (1908).]

Indeed, this Court has long left to the states to decide "whether and to what extent the State will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions." *General Oil Co. v. Crain*, 209 U.S. 211, 224 (1908); *accord Chambers v. Baltimore & O. R. Co.*, 207 U.S. 142, 148 (1907).

California has done just that. Enacting § 354.6, the California Legislature declared that state policy is to provide a "hearing" for forced-labor victims who provided "ill-gotten wealth" to firms "presently doing business in California." C.C.P. § 354.6 statutory notes (Appendix hereto ("Reply Apdx.") at 1a). California is constitutionally entitled to exercise jurisdiction over those companies doing business in the State. *See Goad v. Celotex Corp.*, 831 F.2d 508, 513 (4th Cir. 1987).

Further, this nation has long operated on the premise, consistent with international law, that because limitations periods are procedural in character, local forums are entitled to apply their own local limitations periods – and to change them as they please. Applying the local forum's limitations period without regard to where – or under what law – the underlying claims arose was "the rule in international law at the time the Constitution was adopted," when "there was no other developed body of conflicts law to which courts in our new Union could turn for guidance." *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 723-24 (1988); *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 326-27 (1839) (on choice of limitations periods "the lex fori must prevail"); *Le Roy v. Crowninshield*, 15 F. Cas. 362, 365, 371 (No. 8269) (C.C.D. Mass. 1820) (Story, J.) (collecting cases). This rule remains a fundamental part of our constitutional jurisprudence – governing relations among the several states, under the full-faith-and-credit clause as well. *Sun Oil*, 486 U.S. at 723-26. Limitations periods involve the choice of local rules that, consistent with the "well understood rights of nations," is committed to a forum state's sovereign power, to be exercised

by it without fear that any other nation or state might take offense. *M'Elmoyle*, 38 U.S. (13 Pet.) at 327; *see Sun Oil*, 486 U.S. at 724-26.

Contrary to respondents' assertion that § 354.6 does not involve any "traditional state concern," California has a strong and legitimate interest in providing a "hearing" to forced-labor victims, whose labor provided the "basis of ill-gotten wealth" for many large "firms presently doing business in California." Cal. Stats. 1999, c.216 § 2 (S.B. 1245) (Reply Apdx. at 1a). Many thousands of forced-labor victims live in California – whether as resident aliens or naturalized citizens. *See id.* California has an overriding interest, moreover, both in regulating corporations that do business within its borders, and in ensuring that those corporations take responsibility for their tortious acts.[4] That interest encompasses respondents, which are enormous participants in and beneficiaries of the California economy – among nearly 1200 Japanese-owned or affiliated companies operating in California. California has a current, vital, continuing and important interest in the conduct of corporations that benefit from operating in the State.

D. Respondents Assert Extraneous And Irrelevant Issues to Obscure The Ninth Circuit's Error

Finally, respondents repeat some of the alternative dismissal arguments they asserted below. Neither lower court adopted those arguments. Respondents may chose to reassert them here if the Court accepts review, but they offer no reason to deny review.

CONCLUSION

The petition for writ of certiorari should be granted.

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4. California's interest in affording a hearing to all forced labor victims is rooted in the legitimate legislative purpose of assuring that respondents' ill-gotten gains are not exploited in California.

Respectfully submitted,

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APPENDIX

APPENDIX — STATUTORY NOTES TO CALIFORNIA CIVIL PROCEDURE CODE § 354.6

SECTION 1. (a) Thousands of victims of Nazi persecution, and the heirs of victims of Nazi persecution, are residents of the State of California.

(b) These victims of Nazi persecution have been deprived of their entitlement to compensation for their labor and for injuries sustained while performing that labor as forced or slave laborers prior to and during the Second World War.

(c) California has a moral and public policy interest in assuring that its residents and citizens are given ~~a~~ reasonable opportunity to claim their entitlement to compensation for forced or slave labor performed prior to and during the Second World War.

(d) To the extent that the statute of limitations applicable to claims for compensation is extended by this act, that extension of the limitations period is intended to be applied retroactively, irrespective of whether the claims were otherwise barred by any applicable statute of limitations under any other provision of law prior to the enactment of this act.

SEC. 2. It is the intent of the Legislature, in addition to the provisions of this act, to enact additional public policy in any other case of proven patterns of slave labor employed by firms presently doing business in California that served as the basis of ill-gotten wealth at the expense of victims who are residents of California.

Appendix

SEC. 3. The Treasurer, the Public Employees Retirement System, and the State Teacher's Retirement System shall monitor and report to the Legislature on investments of the state and its pension funds in companies doing business in California, and affiliates of those companies, that owe compensation to victims of slave and forced labor from 1929 to 1945.

Section 1 to 3 of Stats. 1999, c.216 (S.B. 1245).

(3) (3) (3) (4)

Nos. 02-1773, 02-1776, 02-1778, 02-1784

Supreme Court, U.S.
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In The
Supreme Court of the United States

SUK YOON KIM, on behalf of himself and all others similarly situated,

Petitioner,

v.

ISHIKAWAJIMA HARIMA HEAVY INDUSTRIES, LTD., *et al.*,

Respondents.

[Additional Captions On Inside Cover]

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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No. 02-1776

LESTER I. TENNEY, *et al.*,

Petitioners,

v.

MITSUI & CO., LTD., *et al.*,

Respondents.

No. 02-1778

ZHENHUAN MA, SHANG-TING SUNG, AIZHU SU, and CHUNSHENG TIAN, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

KAJIMA CORPORATION, *et al.*,

Respondents.

No. 02-1784

ALBERTO SALDAJENO, *et al.*,

Petitioners,

v.

ISHIHARA SANGYO KAISHA LTD., *et al.*,

Respondents.

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BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The State of California as amicus curiae files this brief pursuant to Rule 37 of the Rules of the Supreme Court of the United States.

INTEREST OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

The Attorney General of the State of California submits this amicus curiae brief in support of the petition for writ of certiorari filed by petitioners urging the Court to grant certiorari of the Ninth Circuit's decision in *Deutsch v. Turner*, 324 F.3d 692 (9th Cir. 2003). In that decision, the Ninth Circuit struck down a California statute extending the limitations period for claims for unpaid wages and injury owed to slave laborers forced to work for private companies during World War II. The Court of Appeals found the California statute, which provides a forum for the adjudication of such claims, to violate the foreign affairs provisions of the United States Constitution. The Ninth Circuit's overly expansive interpretation of the foreign affairs doctrine is at odds with this Court's recent analysis of the foreign affairs doctrine in *Am. Ins. Ass'n v. Garamendi*, 539 U.S. ___, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003). The lower court ruling, moreover, has far-reaching implications for the sovereignty of the States. Absent guidance from the Court, the lower court's decision will impede the ability of States to enact legislation in areas of traditional state competence.

As California's chief law officer (see CAL. CONST. art. V, § 13), the Attorney General has a strong interest in defending the validity of this important and historic legislation, which compels him to urge review of the lower court's decision. Accordingly, the Attorney General submits this brief in support of these four petitions, all of which seek certiorari of the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

The State of California urges review of *Deutsch v. Turner* because of the important, indeed historic, interests at stake and the wide-ranging harm that may be caused by the Ninth Circuit's misapplication of the foreign affairs doctrine.

The statute at issue, California Code of Civil Procedure section 354.6 ("Section 354.6"), is state legislation that has traditionally been deemed within the authority and province of the States to enact, namely, the extension of a statute of limitations and the provision of a state forum for the litigation of tort-related grievances. In this case, that state authority has been applied to a matter of undeniable importance, claims for unpaid wages and injury owed to slave laborers who were forced to work for private companies during World War II.

The Ninth Circuit below, however, held that Section 354.6 violates the foreign affairs provision of the United States Constitution. The Ninth Circuit reached this decision by applying a novel and unworkable standard, namely, that state regulation of "matters related to war" violates the foreign affairs doctrine, regardless of the

absence of a conflicting federal statute or treaty, regardless of how incidental or tangential the nexus between the statute and foreign affairs powers might be, and regardless of the importance of the State's countervailing interest underlying the statute.

The lower court's unprecedented and expansive standard jeopardizes the States' sovereign interests in this important matter and, further, will impair the ability of States to enact legislation in areas of traditional state competence.

Moreover, certiorari is warranted, not simply because the *Deutsch* decision is at odds with *Garamendi*, but also because *Garamendi* does not fully resolve the unique and important questions presented here.

ARGUMENT

I. THE LOWER COURT'S DECISION UPSETS THE BALANCE OF POWER BETWEEN THE STATES AND THE FEDERAL GOVERNMENT BY UNDULY ENCROACHING UPON THE STATES' SOVEREIGN POWERS.

The Ninth Circuit's expansion of the foreign affairs doctrine undermines California's sovereignty in an area of state interest that is centuries old.

"[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). "The powers not delegated to the United States Constitution, nor prohibited to it by the states, are reserved to the states respectively, or to the people." U.S. CONST. art. X.

"Within this system, the Federal Government is vested with limited powers, while the States retain substantial sovereign authority." *Gregory v. Ashcroft*, 501 U.S. at 457. This federalist system requires a proper balance between the States and the Federal Government. "In the tension between federal and state power lies the promise of liberty." *Id.* at 459.

In 1999, the California Legislature exercised this sovereignty by enacting Section 354.6, an emergency measure that extends the limitations period for a defined class of claims relating to forced or slave labor performed prior to and during World War II.

Statutes of limitations are creatures of legislative grace, subject to a relatively large degree of legislative control. *Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 314 (1945). As the Court noted in *Sun Oil v. Wortman*, 486

U.S. 717 (1988), "a State's interest in regulating the workload of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations." 486 U.S. at 730.

Accordingly, like the statute of limitations in *Sun Oil,* Section 354.6 is a valid exercise of California's sovereign authority to assess the workload of its courts and extend its own limitations periods to the types of claims identified in Section 354.6.

The magnitude of the compelling state interests underlying the enactment of Section 354.6 cannot be overstated. The horrors suffered by petitioners and numerous other persons before and during the Second World War who were subject to slavery at the hands of private corporations has not been seen since. Hopefully, it will not reoccur in our lifetimes or those of our children. The sheer gravity of harms, and the unique place these harms occupy in history, should compel the Court, at a minimum, to rectify the Ninth Circuit's sweeping construction of the foreign affairs doctrine.[1]

---

[1] The importance of this issue to the State of California is illustrated by the fact that the California Supreme Court has accepted review of California appellate decisions addressing California Code of Civil Procedure section 354.6 and the claims brought pursuant to the statute. See *Mitsubishi Materials Corp. v. Superior Court*, 106 Cal.App.4th 39, 130 Cal.Rptr.2d 734 (2003), review granted, depublished, 133 Cal.Rptr.2d 147 (2003); *Taiheiyo Cement Corp. v. Superior Court*, 105 Cal.App.4th 398, 129 Cal.Rptr.2d 451 (2003), review granted, depublished, 133 Cal.Rptr. 2d 147 (2003).

The California Legislature, recognizing the unspeakable anguish suffered by these slave laborers, exercised its sovereign powers in enacting a law that extends the limitations period and provides a forum in California courts for claims for lost wages and personal injury suffered by these slave laborers. As noted above, the State of California acted wholly within its sovereign powers in regulating its limitations period. *Sun Oil v. Wortman*, 486 U.S. at 722.

An equally compelling state interest underlying the California Legislature's actions was its desire to ensure that companies doing business within California, who avail themselves of the benefits of California's economy, compensate workers such as the slave laborers who toiled for those companies before and during the Second World War.

Despite these compelling state interests and California's legitimate exercise of its sovereignty, the Ninth Circuit invalidated Section 354.6, based upon a novel and highly questionable application of foreign affairs preemption.

Rather than applying the various tests set forth in *Zschernig v. Miller*, 389 U.S. 429 (1968), and without the guidance of *Garamendi*, the Ninth Circuit interprets the foreign affairs provisions implicit in the Constitution as primarily concerning war or designed to prevent war. 324 F.3d at 711. Although the Ninth Circuit characterizes "the power to make and resolve war, including the resolution of claims arising out of such actions," as a subset of the foreign affairs powers, it impliedly rejects the nuanced analysis of foreign affairs preemption previously articulated by this Court in *Zschernig*. *Id.* at 712. Instead, the

Ninth Circuit sweepingly declares off-limits to the States "matters related to wa. . . . ," without analyzing the nexus of the state regulation to foreign affairs, the impact of the regulation upon foreign affairs, and the existence of any conflicting federal treaty or statute. *Id.*

The State of California respectfully submits that this "matters related to war" standard is rife with ambiguity. Unless rejected or clarified, it will result in an unwarranted erosion of state sovereign powers, in areas of traditional state competence.

II. THIS CASE PRESENTS AN OPPORTUNITY TO FURTHER CLARIFY THE FOREIGN AFFAIRS DOCTRINE ON A MATTER OF HISTORIC IMPORTANCE.

In addition to the confusion and disharmony created by the *Deutsch* court's decision, certiorari is warranted because these cases present an opportunity for the Court to clarify the foreign affairs preemption doctrine. In *Garamendi*, the Court's most recent treatment of this still unsettled doctrine, the Court ruled based upon the facts presented it, leaving for another day questions regarding the full scope of this doctrine.

Specifically, in *Garamendi,* this Court addressed California's Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"), Cal. Ins. Code §§ 13800 et seq., which required any insurer doing business in California to disclose information about all policies the business or anyone related to the business sold in Europe between 1920 and 1945. Finding an actual and "sufficiently clear" conflict between the terms of the HVIRA and the President's foreign policy as expressed in executive agreements such as the German

Foundation Agreement and in statements by high-level Executive Branch statements, the Court held that the reporting provision at issue in HVIRA was preempted under the foreign affairs doctrine. *Garamendi*, 123 S.Ct. 2374, 2390-2392. The Court thus based its decision on conflict preemption within the foreign affairs doctrine, without needing to resolve the larger question of what standard to apply in the absence of an actual conflict.

Because it recognized an actual conflict, this Court in *Garamendi* appropriately deferred for another day the "fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions, . . . " *Garamendi*, 123 S.Ct. 2374, 2389 (footnote omitted).

In contrast, all petitioners in these cases now before the Court assert there is no conflict between their claims and any treaties or executive agreements. Indeed, in none of these cases is the German Foundation Agreement, relied upon by this Court in *Garamendi,* applicable.

Accordingly, these cases present the Court with the opportunity to complete the foreign affairs analysis it began in *Garamendi*. In doing so, the Court can and should address the appropriate standard to apply where, unlike the facts presented in *Garamendi*, a "sufficiently clear" conflict is not present. In this manner, the Court can clarify *Zschernig's* current relevance in defining foreign affairs preemption.

CONCLUSION

For the foregoing reasons, the State of California respectfully urges the Court to grant certiorari.

Respectfully submitted,

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August 4, 2003